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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOME BOX OFFICE, INC. and
SHOWTIME ENTERTAINMENT CORPORATION,
Petitioners,

v.

CRIMPERS PROMOTIONS INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Should the question reserved in note 44 of *Associated General*:

> "whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market"

be explicitly answered:

> (a) in the negative, as Petitioners contend; or
>
> (b) affirmatively (as the Second Circuit has done) in a manner that grants standing to one who is neither a competitor nor a consumer in the relevant market?

2. Does the judgment below constitute an unwarranted expansion of antitrust standing that is inconsistent with this Court's *Associated General* decision?*

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* *Associated General* is reported at 103 S.Ct. 897 (1983).

THE PARTIES

All three parties are listed in the caption. At the time suit was brought the correct name of "Showtime Entertainment Corporation" was "Showtime Entertainment." The current successor entity to "Showtime Entertainment" is "Showtime/The Movie Channel Inc." For purposes of this petition, the parties will be referred to as "Crimpers," "HBO" and "Showtime."**

** Pursuant to Rule 28.1 of this Court, Petitioners provide the following information: HBO is a wholly-owned subsidiary of Time Incorporated. Showtime's ultimate parent companies are American Express Company, Viacom International Inc. and Warner Communications, Inc. This list excludes wholly-owned subsidiaries and other entities that do not have any publicly-held securities.

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IN THE

Supreme Court of the United States

October Term, 1983

No. 83

HOME BOX OFFICE, INC. and
SHOWTIME ENTERTAINMENT CORPORATION,

Petitioners,

v.

CRIMPERS PROMOTIONS INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Home Box Office, Inc. ("HBO") and Showtime Entertainment ("Showtime") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 12, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 724 F.2d 290 (2d Cir. 1983) and unofficially reported at 1984-1 Trade Cases (CCH) ¶ 65,772 (2d Cir. Dec. 12, 1983). The December 12, 1983 judgment of the Court of Appeals and the January 25, 1984 order of the Court of Appeals denying HBO's and Showtime's petition for rehearing are not reported. The opinion of the district court is officially reported at 554 F. Supp. 838 (S.D.N.Y. 1982) and unofficially reported at 1982-83 Trade

Cases (CCH) ¶ 65,123 (S.D.N.Y. Dec. 30, 1982). The two opinions, the judgment, the order, and the complaint are reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1983, and the order of the Court of Appeals denying HBO's and Showtime's petition for rehearing was entered on January 25, 1984. (Appendix C (hereinafter "App. ____.").) This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Clayton Act § 4(a) provides in pertinent part:

> "* * *[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained * * *."

15 U.S.C. § 15(a) (1982). Sherman Act § 1 provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *"

15 U.S.C. § 1 (1982). Sherman Act § 2 provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony * * *"

15 U.S.C. § 2 (1982).

STATEMENT OF THE CASE

The overall thrust of the complaint, which must be viewed as true for purposes of this petition, is that HBO and Showtime have restrained trade in and monopolized the market for the purchase and sale of cable television programming.[1] This market is comprised of a four-level distribution chain. Notably, Crimpers is not a participant at any level in this distribution chain.

The first level in the distribution chain consists of producers of cable television programs (hereinafter the "Producers"). Producers typically would be motion picture studios who license their films for cable television distribution after a first run in the theatres.[2] The second level in the distribution chain is comprised of programming packagers such as HBO and Showtime who obtain programming licenses from the Producers and then package the movies and other programs into a 24-hour network format for nationwide distribution via satellite (hereinafter the "Satellite Networks"). The third level in the distribution chain is comprised of local cable television station operators who obtain licenses from the Satellite Networks to receive and retransmit satellite distributed programming (hereinafter the "Cable TV Operators"). The fourth level in the distribution chain is comprised of individual homeowners who subscribe for a monthly fee to programming distributed by their local Cable TV Operator. (App. A at 2a; App. B at 2b-3b; App. D at 3d-5d.) The Producers have the option of selling their programming to any one of the three levels below them, *i.e.*, to the Satellite Networks for packaging into a 24-hour format, or to the Cable TV Operators on a "stand-alone" basis, or to consumers through video stores.

Crimpers is not a participant at any level in this distribution chain for cable television programming. Instead, Crimpers was the organizer of a single trade show. It ran a three-day trade

1. Counts I and II of the complaint set forth Crimpers' Sherman Act §§ 1 and 2 claims. The remainder of the complaint is not pertinent to this petition. Count III has been dismissed, and Counts IV-VI deal with state law claims.

2. HBO and Showtime both produce some of their own original programming. In this sense HBO and Showtime are producers, but this fact plays no role in Crimpers' theory of the case.

show at the Las Vegas Hilton on September 25-27, 1981. The trade show was called CATEL-EXPO-PROGRAMMING SOURCES '81 (hereinafter "CATEL"). According to Crimpers, the purpose of this trade show was to provide a forum or location at which Producers and Cable TV Operators, levels one and three in the distribution chain for cable television programming, could deal directly with each other buying and selling "stand-alone" programming, thus bypassing the packaging and distribution services offered by the Satellite Networks. (App. A at 2a-3a; App. B at 2b; App. D at 2d-3d, 6d-7d.)

Crimpers' complaint alleges that HBO and Showtime have monopolized and restrained trade in the market for the distribution of cable television programming by preventing the Producers of "stand-alone" programming, who are HBO's and Showtime's suppliers, from dealing directly with the Cable TV Operators, who are HBO's and Showtime's customers. According to the complaint, one means used by HBO and Showtime to effectuate their goal of preventing direct dealing between Producers and Cable TV Operators was to threaten to stop buying programming from the Producers. These supposed threats by HBO and Showtime to their suppliers allegedly induced the Producers not to sell programming on a "stand-alone" basis to the Cable TV Operators. HBO and Showtime allegedly committed other violations all of which were intended to effectuate HBO's and Showtime's overarching goal of preventing direct dealings between their suppliers and their customers. Thus, the principal antitrust violation alleged in the complaint is a "coerced boycott," *i.e.*, HBO and Showtime coerced their suppliers into boycotting, or refusing to deal with, HBO's and Showtime's customers. (App. A at 2a-4a; App. B at 3b-4b; App. D at 7d-14d.)

Crimpers alleges that it in particular was injured because HBO and Showtime, fearing that CATEL would provide a forum at which Producers and Cable TV Operators could meet, used the same type of threats to induce the Producers not to attend

CATEL. Thus, Crimpers claims that it, like the Cable TV Operators, was a victim of a boycott. The Court of Appeals summarized Crimpers' claim as follows:

> "* * * Here Crimpers claims to be a victim of HBO's and Showtime's conspiracy to prevent direct dealing between producers and television stations by boycotting CATEL."

(App. A at 13a.) The complaint alleges that HBO's and Showtime's acts had the following anticompetitive effect:

> "The result of the conspiracy entered into by and between the defendants has been the restraint of trade in interstate commerce in the Cable Television Industry which has lessened and/or eliminated competition in the manufacture, purchase and sale of programming and has resulted in the creation of a monopoly by the defendants in the business of the transmission of cable television to the ultimate subscriber or consumer."

(App. D at 13d.)

In the District Court HBO and Showtime moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Crimpers' Sherman Act §§ 1 and 2 claims on the ground that Crimpers lacked antitrust standing to sue for treble damages pursuant to Clayton Act § 4. HBO and Showtime placed principal reliance on the Second Circuit's carefully circumscribed "target area" test for antitrust standing. HBO and Showtime contended that only Producers and Cable TV Operators, not Crimpers, were participants in the market "targeted" by the alleged violations -- the market for the purchase and sale of cable television programming. Relying on this Court's then newly-announced decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (hereinafter "*McCready*"), the District Court denied the motion. It held that, although Crimpers was "slightly more remote a plaintiff for purposes of its Section 1 and 2 claims than the plaintiff in *McCready*," Crimpers nevertheless satisfied the *McCready* test for standing because

> "the boycotting and intended destruction of plaintiff's trade show was one of the clearest and most direct means by which to achieve defendants' alleged goal of restraining trade in the buying and selling of cable programming on a stand-alone basis."

(App. B at 13b.)

After the District Court wrote its decision, this Court decided *Associated General Contractors, Inc. v. California State Council of Carpenters*, 103 S. Ct. 897 (1983) (hereinafter "*Associated General*"). Pursuant to 28 U.S.C. § 1292(b) the District Court then certified its decision for interlocutory appeal, and the Court of Appeals granted leave to appeal. In describing the complaint the Court of Appeals expressly recognized that Crimpers was injured only because it "got in the way" of HBO's and Showtime's supposed goal of preventing direct dealings between the Producers and the Cable TV Operators:

> "* * * The alleged violations were defendants' conspiring to interpose barriers against direct dealings between the producers and the stations and attempting to monopolize the business of furnishing programs. Crimpers got in the way and defendants allegedly made it suffer for trying to do so."

(App. A at 8a-9a.)

Like the District Court, however, the Court of Appeals placed principal reliance on *McCready* in granting standing to Crimpers. The Court of Appeals also distinguished the factors that led this Court to deny standing in *Associated General*. The Court of Appeals concluded:

> "* * * [W]e are unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under § 4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants. * * *"

(App. A at 14a-15a.)[3]

The district court had subject matter jurisdiction of Crimpers' antitrust claims pursuant to 28 U.S.C. § 1337.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ. First, the decision below conflicts directly with the very core of this Court's ruling in *Associated General*. *Associated General* demonstrates that only Producers and Cable TV Operators would have standing to challenge a conspiracy to prevent direct dealings between them. As participants in the affected industry, they would be the entities entitled to sue for the increased costs of distribution or "tribute" (App. A at 14a-15a) that HBO and Showtime allegedly extracted as middlemen. Crimpers, as an operator of a three-day trade show in Las Vegas, is not entitled to sue for alleged antitrust violations that were directed at a marketplace in which Crimpers did not participate as a buyer or seller. Applying a key criterion for determining antitrust standing set out in *Associated General*, Crimpers lacks standing because it was "neither a consumer nor a competitor in the market in which trade was restrained." 103 S. Ct. at 909. While paying lip service to this Court's ruling in *Associated General*, the Court of Appeals actually adopted a contrary standard based on a misreading of the prior *McCready* decision.

Second, the Court of Appeals' ruling directly conflicts with a Seventh Circuit decision which this Court implicitly endorsed more than a year ago. As discussed in more detail below, this Court appeared to have sent out a clear signal as to the appropriate ruling in this case when, on February 28, 1983, it simultaneously vacated a Ninth Circuit decision granting standing to a plaintiff like Crimpers and denied certiorari in a Seventh Circuit decision denying standing to a plaintiff like Crimpers. In doing so, this Court appeared to answer implicitly the question reserved in note 44 of *Associated General*. 103 S. Ct. at 910 n. 44 (last

3. The Second Circuit also concluded that its own long established view of antitrust standing had not survived this Court's decisions in *McCready* and *Associated General*. (App. A at 6a-7a.)

sentence). *Compare Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983) (hereinafter "*Ostrofe*") *with Bichan v. Chemetron Corp.* (*In re Industrial Gas Antitrust Litigation*), 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983) (hereinafter "*Bichan*").

Bichan holds that an intended direct victim of a group boycott has no antitrust standing where the purpose of the boycott was to restrain trade in some other marketplace. *Ostrofe*, which this Court vacated and remanded for further consideration in light of *Associated General*, reached exactly the opposite conclusion. The Court of Appeals, however, totally ignored this Court's actions in *Ostrofe* and *Bichan*, which had resolved the conflict between the Ninth and Seventh Circuits. Instead, the Court of Appeals reinstated the same conflict, this time between the Seventh and Second Circuits, and created a conflict with this Court as well, by holding that a boycott victim does have antitrust standing where the sole purpose of the boycott was to further a restraint of trade in a different marketplace.[4]

Third, the decision of the Court of Appeals threatens to resurrect the chaotic condition of antitrust standing law that existed prior to this Court's efforts to set out guidelines for decision in *Associated General*. As this Court recognized in *Associated General*, the federal courts of appeal had earlier adopted a variety of sometimes inconsistent tests for determining antitrust standing. 103 S. Ct. at 908 n.33. *Associated General* purported to resolve these inconsistencies. *Id.* (last sentence). In doing so, the Court set out a qualified set of criteria for determining antitrust standing. HBO and Showtime submit that the Court of Appeals misread the tenor of this Court's *Associated General* decision and instead focused upon language taken out of context

4. In addition to not citing *Bichan* or *Ostrofe*, the Court of Appeals also ignored one of its own decisions denying standing to a plaintiff like Crimpers. *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973) (hereinafter "*GAF*"). By ignoring this precedent the Court of Appeals has created confusion within the Second Circuit itself.

from *McCready* in order to achieve the open-ended view of standing evidenced by the decision below. If left standing, the decision below would frustrate *Associated General's* underlying purpose, which was to create a consistent body of standing guidelines.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S *ASSOCIATED GENERAL* RULING

This Court's *McCready* and *Associated General* decisions and Crimpers' claim all involve alleged coerced boycotts. In such a case the defendants are alleged to have coerced third-parties ("coerced boycotters") into boycotting intended victims ("boycottees").[5] If the coercion succeeds, a coerced boycott takes place. Sometimes, however, the third party subjected to coercion resists the coercion, refuses to become a coerced boycotter, and instead suffers the economic coercion. In this situation, there has been an unsuccessful or failed coerced boycott.

Crimpers is suing as a boycottee, *i.e.*, as a victim of a successful coerced boycott. Crimpers clearly is not suing as a coerced boycotter since Crimpers does not claim HBO and Showtime ever attempted to coerce it to do anything. Although Crimpers claims it was the victim of a boycott, neither Crimpers nor the courts below have viewed the complaint as alleging that the boycott of Crimpers was, in and of itself, an antitrust violation.[6] Rather, Crimpers claims that it was boycotted in furtherance of an antitrust conspiracy to prevent direct dealings between the Producers and the Cable TV Operators.

The *McCready* case involved a failed coerced boycott. Mrs. McCready sued as a person who had refused to succumb to

5. The third party typically has a significant economic relationship with the intended victim of the boycott, *e.g.*, a supplier or customer relationship.

6. There is no way to construe the complaint as alleging that the boycott of Crimpers was itself an antitrust violation. If, however, Crimpers had alleged that HBO and Showtime orchestrated a boycott of CATEL in order to restrain trade in the trade show market in which Crimpers competed, Crimpers obviously would have had standing. See discussion at p. 15 n.12 below. HBO and Showtime, however, would have nothing to gain from restraining trade in the trade show market since they are not participants in that market.

defendants' economic sanctions intended to make her become a coerced boycotter. Mrs. McCready alleged that a group of psychiatrists and Blue Shield had conspired to coerce her into patronizing a psychiatrist instead of her psychologist by threatening to withhold her insurance reimbursement if she patronized a psychologist. Mrs. McCready, however, resisted the coercion, continued to see her psychologist, and was denied her insurance reimbursement. 457 U.S. at 468-70, 483. She then sued for the reimbursement she was denied, and this Court held that she had standing to do so. In granting standing, this Court explained that Mrs. McCready, not the psychologists, was the injured party precisely because Mrs. McCready had continued to patronize her psychologist:

> "* * * [A]s it happened, the injury was borne directly by the customers of the competitors. McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. * * *"

457 U.S. at 483; *see Associated General*, 103 S. Ct. at 910 n.44 (Mrs. McCready's status was "comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices").

Associated General involved an alleged successful coerced boycott in which antitrust standing was denied. There the plaintiff unions (the "Union") contended that the defendants coerced landowners, others who let construction contracts, and general contractors to divert business from union firms to non-union firms. This Court held that the Union lacked standing. In dictum, the Supreme Court indicated that under these circumstances, which involved an alleged successful coerced boycott, there were two potential plaintiffs--the coerced boycotters (landowners and general contractors) and the boycottees (the unionized firms).[7] This result is virtually identical to the situation discussed in dictum in the "bank" footnote in *McCready* upon

7. The Court first indicated that the unionized boycottees had standing, 103 S. Ct. at 910, and second indicated that the coerced boycotters also had standing, 103 S. Ct. at 910 n. 44, *citing Connell*

which the Court of Appeals placed heavy reliance in granting standing to Crimpers. The "bank" discussion in *McCready* was as follows:

> "* * * If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of psychologists against whom that secondary boycott was directed."

457 U.S. at 484 n.21. This footnote, like *Associated General*, simply indicates that the coerced boycotters (the banks) and their boycottees (the psychologists) would both have antitrust standing.[8]

The dicta in *Associated General* and *McCready* regarding who has standing in a successful coerced boycott case is limited by a single critical criterion in both cases, a criterion that Crimpers fails to satisfy here. This criterion is expressed in both cases as a clear-cut holding. Standing is dependent upon a showing that the plaintiff is a *participant* in the market affected by the alleged violation. In *McCready* this Court held that Mrs. McCready, as a consumer of psychotherapeutic services, was a "market participant." This fact was critical to the Court's determination that she had standing:

Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975) (coerced boycotter has antitrust standing).

8. In note 44 of its *Associated General* decision, this Court made clear that coerced boycotters, like the banks in note 21 of *McCready*, invariably have standing. 103 S. Ct. at 910 n.44, *citing Connell Construction Co. v. Plumbers & Steamfitters*, *supra*. Crimpers, of course, is in an entirely different situation than the banks. No one ever attempted to coerce Crimpers into becoming a means of perpetrating an antitrust violation on the Cable TV Operators. Crimpers is not a coerced boycotter, but rather alleges it was a boycottee. Indeed, as the Second Circuit stated, even under Crimpers' theory of the case, it was injured only because it "got in the way" of entirely separate alleged antitrust violations. (App. A at 8a-9a.)

> "* * * Because McCready is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, McCready's participation in the market for psychotherapeutic services provides precisely that significance."

457 U.S. at 484 n.21. Similarly, in *Associated General* this Court's first enumerated criterion for determining standing asked whether the plaintiff was a participant in the market where trade was restrained. This Court held that the Union lacked standing because it "was neither a consumer nor a competitor in the market in which trade was restrained." 103 S. Ct. at 909.

Failure to satisfy this criterion means that the plaintiff has not suffered any "antitrust injury" within the meaning of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (hereinafter "*Brunswick*"). *See Associated General*, 103 S. Ct. at 909-10. The fact that this Court listed the *Brunswick* test as its first criterion of antitrust standing demonstrates the importance that this Court attributes to *Brunswick*. *See Associated General*, 103 S. Ct. at 910. Yet here, the Court of Appeals held that "the principle of *Brunswick* * * * does not apply" under circumstances such as those presented by Crimpers' allegations. (App. A at 9a-10a.) HBO and Showtime submit that the Court of Appeals was wrong. *Brunswick* must be applied to every antitrust standing case, and the *Brunswick* principle clearly bars Crimpers' claims.

Applying this key criterion for determining antitrust standing to the dicta in *McCready* and *Associated General* regarding who has standing in a successful boycott case, it is clear that *Associated General* and the "bank" footnote in *McCready* do no more here than to establish that the Producers (the coerced boycotters) and the Cable TV Operators (the boycottees) have antitrust standing to sue HBO and Showtime for the antitrust violations alleged in the complaint. *See* App. A at 7a-8a (Producers have standing for "getting too little for their programs" and the Cable TV Operators for "paying too much"). The Producers and the Cable TV Operators have antitrust standing because they are

participants in the affected market--the market for the purchase and sale of cable television programming. Crimpers, however, lacks standing because as a trade show operator it was not a participant in the market affected by HBO's and Showtime's alleged conspiracy to preclude direct dealings between the Producers and the Cable TV Operators. Because Crimpers fails to satisfy the "market participant" requirement of *Associated General* and the "antitrust injury" requirement of *Brunswick*, this petition for a writ of certiorari should be granted.[9]

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE SEVENTH CIRCUIT'S *BICHAN* DECISION, AND IS INSTEAD IN ACCORD WITH THE VACATED *OSTROFE* DECISION

The Second Circuit's decision below directly conflicts with the Seventh Circuit's *Bichan* decision, which this Court allowed to stand when it vacated the contrary *Ostrofe* decision for reconsideration in light of *Associated General*. As a result, the Second Circuit has re-created a conflict between the circuits which this Court implicitly resolved more than a year ago, six days after *Associated General* was decided.

Although the general principles set out in *Associated General*, *McCready* and *Brunswick* bar Crimpers' standing here, neither *Associated General* nor the *McCready* "bank" footnote addresses

9. HBO and Showtime submit that Crimpers also fails to satisfy the other criteria for standing set out in this Court's *Associated General* decision. Granting standing to Crimpers would contradict this Court's policy of avoiding multiple recoveries for one antitrust violation, 103 S. Ct. at 911-12, since the Producers and the Cable TV Operators clearly already have standing. Indeed, it is hard to know where the line of plaintiffs would end if everyone who provides a forum or meeting place for participants in the television entertainment business can sue. Second, Crimpers is not the most logical plaintiff. *See* 103 S. Ct. at 911. Again, the Producers and Cable TV Operators who have allegedly paid "tribute" to HBO and Showtime (App. A at 15a) are the most logical plaintiffs to challenge antitrust violations directed at them. Third, granting standing to Crimpers resurrects the concept that "an allegation of improper motive" is a "panacea that will enable any complaint to withstand a motion to dismiss," a concept which this Court expressly rejected. *Id.* at 908.

precisely the question of whether a boycottee such as Crimpers who operates in a market connected to, but separate from, the market that is the target of the alleged violations also has standing. Rather, this Court stated in *Associated General* that it did not need to decide on the facts of that case whether a direct boycott victim has antitrust standing when that boycott is intended to further a restraint of trade in a different market:

> "* * * We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market."

103 S. Ct. at 910 n.44. HBO and Showtime submit that this Court did implicitly answer this question in the negative just six days after the Court propounded it, *i.e.*, on February 28, 1983, in two other cases before it.

On February 28, 1983 this Court ruled on two antitrust cases involving the exact question presented here: Does a boycott victim have antitrust standing where it is not alleged that the boycott directed against the plaintiff was an antitrust violation but instead it is alleged that the boycott was in furtherance of an antitrust violation directed at others. The two cases are *Ostrofe* and *Bichan*. Despite HBO's and Showtime's reliance upon them, these two cases were completely ignored by the Court of Appeals.

Ostrofe, which was decided by the Ninth Circuit, was the earlier case. There the plaintiff was a discharged employee who alleged that he had been boycotted by his employer and by other employers in the industry.[10] He alleged that both his discharge by the H.S. Crocker Company and the subsequent boycott resulted from his refusal to participate in an industry price-fixing

10. *Ostrofe*, *Bichan* and *GAF* all involved direct boycotts by the defendants, not coerced boycotts. From the point of view of the boycottee, there is no distinction of significance between the two. In fact, Crimpers claims here that HBO and Showtime boycotted CATEL, as well as coercing the Producers to do so. HBO and Showtime submit that for present purposes the analysis is the same for the direct boycott and the coerced boycott claims

and bid-rigging conspiracy. 670 F.2d at 1380. The Ninth Circuit held that Ostrofe had standing to challenge the alleged boycott.[11]

The Seventh Circuit's *Bichan* decision involved a fact pattern virtually identical to that in *Ostrofe*. The Seventh Circuit described the question presented as follows:

> "* * * The issue on appeal is whether Robert C. Bichan, a salaried executive who was terminated from his position [with a defendant] and blacklisted by the industrial gas industry has standing * * * under § 4 * * *.
>
> * * *
>
> "* * * Bichan alleges that a conspiracy existed to fix prices, to impose conditions of sales on customers and to allocate customers [in the industrial gas industry]. He maintains that he was fired and blacklisted because he refused to adhere to these illegal practices. * * *"

681 F.2d at 515. Applying a "target-area" test for antitrust standing, the Seventh Circuit concluded that Mr. Bichan had not suffered any "antitrust injury" within the meaning of *Brunswick*. 681 F.2d at 516-19. In doing so, the Seventh Circuit stated that it expressly disagreed with the result reached in *Ostrofe*. 681 F.2d at 518-19.[12]

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11. The Ninth Circuit concluded that all group boycotts are *per se* violations of the antitrust laws regardless of whether the defendants intended to restrain trade in the boycotted market or some other market. *See* 670 F.2d at 1381 & n.3. As shown below, *GAF* and *Bichan* hold to the contrary.

12. The Seventh Circuit concluded that in *Ostrofe* the Ninth Circuit had misapplied the *Brunswick* doctrine. 681 F.2d at 518-19. The Seventh Circuit also distinguished this Court's decision in *Radovich v. National Football League*, 352 U.S. 445 (1957), a case on which the *Ostrofe* court had relied. The Seventh Circuit concluded that *Radovich*, which involved a blacklisted football player, was inapplicable because it involved a boycott aimed at the labor market, whereas Mr. Bichan had failed to allege that his blacklisting was intended to restrain competition in the labor market in which he was seeking employment. 681 F.2d at 517. (Similarly, here, Crimpers has not alleged that the boycott of CATEI was intended to restrain trade in the trade show market.) Thus, the Seventh Circuit's *Bichan* decision, like the *GAF* decision discussed below, expressly rejects the concept articulated in

Bichan makes clear that a person such as Crimpers who merely serves to "induce and encourage competition," 681 F.2d at 517, does not thereby become a competitor. *Id.*[13] The Second Circuit reached the opposite conclusion. Its *ipse dixit* that Crimpers was a "competitor" of HBO and Showtime "in the sense that its trade show would have served to facilitate the direct dealing between producers and television stations * * *" (App. A at 13a n.6) runs counter to the clear meaning of "competitor". Even the district court ruled that Crimpers was not a competitor in the relevant market. (App. B at 7b n.3.)

On February 28, 1983 this Court granted certiorari in the *Ostrofe* decision, vacated it and remanded it for further consideration in light of *Associated General*. 103 S. Ct. 1244. On the same day this Court denied certiorari in *Bichan*. 103 S. Ct. 1261.[14] HBO and Showtime submit that, by allowing *Bichan* to stand while vacating *Ostrofe*, this Court signaled its view that *Bichan* was correctly decided and that *Ostrofe* was wrongly decided. This Court's two rulings implicitly answered in the negative the question reserved in note 44 of *Associated General*,[15] *i.e.*, the direct victim of a boycott has no antitrust standing if the boycott was only intended to further some separate antitrust violation. These actions by this Court indicate that the Court of Appeals' grant of standing to Crimpers was incorrect. Because Crimpers' claim is directly analogous to those asserted by Mr. Ostrofe and Mr. Bichan, Crimpers lacks standing to sue under Clayton Act § 4.

The Second Circuit's refusal to acknowledge the existence of *Bichan* is particularly inexplicable in light of the fact that the Second Circuit's decision in *GAF* is directly in accord with the

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Ostrofe that every group boycott automatically confers antitrust standing on its targets.

13. Like Mr. Bichan, Crimpers alleges that HBO's and Showtime's "conspiracy has had as its intent and purpose the elimination of competition which would have been created by the trade show conducted by the plaintiff." (App. D at 10d.)

14. Justice Blackmun voted to treat *Bichan* in the same manner as *Ostrofe*. 103 S. Ct. 1261.

15. The actual language of the question reserved in note 44 is quoted above at page 14.

result reached in *Bichan*. In *GAF*, GAF was resisting a hostile takeover attempt on the ground that the takeover would be an illegal merger. GAF, however, did not claim that the merger would harm it. Instead, GAF alleged that the takeover bidder, one of GAF's largest customers, had along with others boycotted GAF in order to reduce GAF's profits, thereby weakening its resistance to the takeover attempt. 463 F.2d at 755-56. The Second Circuit held that this alleged concerted refusal to deal directed against GAF by the defendants, *i.e.*, a group boycott, did not result in any "antitrust damages" to GAF because the concerted refusal to deal was done only in furtherance of defendants' attempts to effectuate an illegal vertical merger. The Second Circuit held:

> "Assuming that GAF could establish that the partial withdrawal of business by Circle Floor [*i.e.*, the boycott] resulted in some lost profits, that loss * * * would not be the result of diminution in competition produced by the substantive violations of the Sherman and Clayton Acts alleged in the complaint. * * * GAF is in effect contending that because appellees' alleged activities threatened the competitive position of others, it can maintain a suit under § 4 * * * merely by alleging some loss. But this is not the law. * * *"

463 F.2d at 757 (alternative holding).[16]

HBO and Showtime submit that *GAF*, like *Bichan*, answers the exact question at issue here. A concerted refusal to deal that is not "alleged as a substantive antitrust violation" in and of itself, 463 F.2d at 759, does not give rise to "antitrust damages" or "antitrust standing" merely because the plaintiff alleges the boycott was in furtherance of a separate antitrust violation directed at third parties. By refusing to follow *GAF* or *Bichan*, the Second Circuit in its decision below created a conflict between the Second and Seventh Circuits. HBO and Showtime submit that the conflict warrants the granting of this petition for a writ of certiorari.

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16. It is worth noting that the district court in *Ostrofe* relied on *GAF* to deny standing to Mr. Ostrofe. *See* 670 F.2d at 1387 n.25.

III. THE RULING BELOW THREATENS TO FRUSTRATE THIS COURT'S EFFORTS TO BRING ORDER TO ANTITRUST STANDING LAW

Prior to *Associated General* the federal courts of appeal had adopted different, and sometimes inconsistent, tests for antitrust standing. 103 S. Ct. at 907-08 n.33. The conflict between the Second Circuit and the Ninth Circuit was probably the most pronounced. Although both courts referred to their test for standing as a "target-area" test, the Second Circuit's test was rigorous, whereas the Ninth Circuit's was open-ended. Under the Second Circuit test a plaintiff was in the target area only if (1) it was a participant in the area of the economy threatened by anticompetitive conduct, *i.e.*, a person against whom competitive aim was taken, and (2) it was directly injured by the alleged violation. *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). In contrast to this narrower view of standing, under the Ninth Circuit's target-area test a plaintiff had standing if it was simply a "foreseeable" victim of the alleged violation. Because foreseeable victims of a violation had standing, intended victims, such as the Union in *Associated General*, automatically had standing. *California State Council of Carpenters v. Associated General Contractors, Inc.*, 648 F.2d 527, 537-38 (9th Cir. 1980), *rev'd*, 103 S. Ct. 897 (1983). Moreover, the Ninth Circuit on occasion abandoned its target-area test entirely, as it did in *Ostrofe*, when that test failed to confer standing on a particular plaintiff, substituting in its place an even more liberal test for standing.

HBO and Showtime respectfully submit that this Court's reversal of the Ninth Circuit's *Associated General* decision and vacation of *Ostrofe* signaled an unambiguous rejection of the open-ended view of standing espoused by the Ninth Circuit. Moreover, this Court stated in *Associated General* that the carefully circumscribed standing criteria specified there should replace all the old standing tests of the various circuits, *see* 103 S.

Ct. at 908 n.33 (last sentence). Notwithstanding all of this, the Court of Appeals in its opinion below inexplicably substituted an open-ended view of antitrust standing which relied principally upon language taken out of context from this Court's *McCready* decision.[17] The Court of Appeals ruled:

> "* * * Just as McCready's injury 'was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market,' [457 U.S. at 484], so Crimpers' injury was inextricably intertwined with the injury the defendants sought to inflict on producers and television stations in the cable television programming market. * * *"

(App. A at 9a.) The Court of Appeals concluded that Crimpers' position was "*a fortiori* to McCready's." (App. A at 10a.)

HBO and Showtime submit that this does not follow. In *McCready* the psychiatrists attempted to make Mrs. McCready an actual boycotter of psychologists, *i.e.*, an actual participant in the perpetration of the violation. Here, on the other hand, there is no allegation that defendants attempted to make Crimpers the instrument of effectuating the boycott against the Cable TV Operators. Rather, as discussed above, it was the Producers who played such a role. The alleged destruction of Crimpers' three-day trade show in Las Vegas was not "inextricably intertwined" with HBO's and Showtime's alleged conspiracy to prevent direct dealings between the Producers and the Cable TV Operators. Keeping these two groups from meeting at the Las Vegas Hilton where CATEL was held was merely incidental to the alleged goal of keeping them from meeting *anyplace*, including hotels, trade shows, restaurants, and board rooms.

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17. The Second Circuit did pay lip service to the criteria for standing in *Associated General* but it did so in a manner which twisted the clear import of those criteria. For instance it simply concluded that Crimpers was a competitor of HBO's and Showtime's when even the district court recognized that this simply was not true. (App. A at 13a n.6; App. B at 7b n.3.) In addition, the Court simply concluded that Crimpers was the "most logical" plaintiff to challenge the alleged conspiracy to prevent direct dealings between the Producers and the Cable TV Operators, when clearly the latter entities are the more logical plaintiffs. (App. A at 14a.)

That Crimpers does not have standing under the *McCready* "inextricably intertwined" language becomes even clearer when Crimpers is compared with Mr. Bichan and Mr. Ostrofe. Mr. Bichan and Mr. Ostrofe alleged that they were the employees who were ordered to carry out illegal pricefixing schemes in the markets in which their employers participated. Both men refused to carry out these orders and were fired. Mr. Bichan argued that "§ 4 protection should * * * be extended to [those] who attempt to encourage competition * * *," 681 F.2d at 517, but the Seventh Circuit rejected this argument, holding:

> "* * * The conspiracy Bichan charges was aimed at restraining competition in the industrial gas market * * *. Since the area of the economy endangered by the anticompetitive scheme was not the labor market, Bichan can claim no 'antitrust injury' [as defined in *Brunswick*]."

Id. HBO and Showtime respectfully submit that this Court allowed *Bichan* to stand, but vacated *Ostrofe*, because (1) Mr. Bichan and Mr. Ostrofe were not "inextricably intertwined" with the alleged antitrust violation to the same degree as was Mrs. McCready, and (2) Mr. Bichan and Mr. Ostrofe were "neither * * * consumer[s] nor * * * competitor[s] in the market in which trade was restrained." 103 S. Ct. at 909. Crimpers' claim is even weaker than Mr. Bichan's and Mr. Ostrofe's claims. No one attempted to compel Crimpers to participate in the alleged antitrust violations at issue here. At best, as the Court of Appeals conceded, Crimpers merely "got in the way" of violations allegedly directed at others. (App. A at 8a-9a.)

The Court of Appeals' ruling that the type of injury suffered by Crimpers allows it to challenge alleged violations admittedly directed at others represents an unwarranted and overly expansive view of antitrust standing. The writ of certiorari should be granted because such an expansive view of antitrust standing is wholly inconsistent with the test for antitrust standing set out in this Court's *Associated General* decision. Allowing the decision of the Court of Appeals to stand is likely to lead to the same

degree of confusion and inconsistency that existed prior to this Court's *Associated General* decision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

April 24, 1984

Respectfully submitted,

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APPENDIX

Appendix A

CRIMPERS PROMOTIONS INC.,
Plaintiff-Appellee,

v.

HOME BOX OFFICE, INC. AND
SHOWTIME ENTERTAINMENT CORPORATION,
Defendants-Appellants.

No. 126, Docket 83-7364.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Argued Nov. 2, 1983.
Decided Dec. 12, 1983.

Robert D. Joffe, New York City (Cravath, Swaine & Moore, New York City), for defendant-appellant Home Box Office, Inc.

John A. Donovan, New York City (Hughes, Hubbard & Reed, New York City), for defendant-appellant Showtime Entertainment Corporation.

Jerry I. Lefkowitz, Forest Hills, N.Y., for plaintiff-appellee.

Before FEINBERG, Chief Judge, and FRIENDLY and PRATT, Circuit Judges.

Appeal by defendants in an action under § 4 of the Clayton Act, by permission under 28 U.S.C. § 1292(b), from so much of an order of the District Court for the Southern District of New York, Leonard B. Sand, *Judge*, 554 F. Supp. 838 (1982), as denied defendants' motion to dismiss counts charging violations of §§ 1 and 2 of the Sherman Act on the ground that plaintiff lacked standing.

Affirmed.

FRIENDLY, Circuit Judge:

The question on this appeal is whether a company organized to hold a trade show to facilitate contacts between producers of cable television programming and local cable television stations has standing to prosecute an action under § 4 of the Clayton Act against two companies which are alleged to dominate the business of purchasing and assembling programming from producers and selling it to the stations. Plaintiff claims that the defendants conspired to cause a boycott of its trade show and to have used their monopoly power to assure the show's failure, in violation of §§ 1 and 2 of the Sherman Act. Judge Sand, in the District Court for the Southern District of New York, answered the question in the affirmative in a well-considered opinion, 554 F.Supp. 838 (1982), but certified his ruling for interlocutory appeal under 28 U.S.C. § 1292(b). We unhesitatingly affirm.

The Proceedings in the District Court

The principal allegations of the complaint here relevant are as follows:

Plaintiff Crimpers Promotions Inc. (Crimpers) was formed in 1980 for the initial purpose of producing a cable television trade show known as CATEL-EXPO-PROGRAMMING SOURCES '81 (CATEL) in Las Vegas during September, 1981. CATEL was to be "the first all programming, conference and exposition in the Cable Television Industry and was formed and produced in order to develop a national and international market place [sic] for Cable Television programming of all types and kinds." The show contained space for 350 booths and it was expected that 5000 or more persons would attend.

Defendant Home Box Office, Inc. (HBO) is the most widely available pay-television satellite network in the United States with approximately 8 million subscribers. It purchases programs from independent producers and also creates its own. It sends programs through a satellite to some 3,000 cable system operators affiliated with HBO, who in turn send them to the homes of various subscribers. In addition HBO provides direct services to

subscribers in certain areas. Defendant Showtime Entertainment Corporation (Showtime) operates similarly, with some 2.5 million subscribers and 1,300 operators or affiliates.

The complaint goes on to allege that the defendants have become the dominant force in the cable pay-television industry and have unlawfully monopolized the market for programming to the industry.[1] Defendants have been able to offer the cable operators a "bundle" of programs which defendants have acquired from the producers and, being "the most powerful and influential sources through which programming may be sold" in the cable industry, have offered extremely low and unfair prices for programming to the independent companies that sell programming to them. The purpose of CATEL is to bring together in one trade show all suppliers of cable programing, both the independents and the networks, for "a truly comprehensive exposition and conference," with the further goal of creating "a diversity of information sources and access so that Cable System Operators would not be dependent upon the defendant whose vast Satellite Network Services dominate the Pay-TV business in Cable Television."

The complaint further alleges that defendants sent letters and made phone calls to independent programming and system operators to inform them that they should not appear at CATEL. It quoted a representative of defendant Showtime as having told a person who he thought was an independent producer that Showtime would not participate in the show because the company believed it to be a "rip-off"; this was because Showtime considered Crimpers to be an "opportunist" and because Showtime's

1. As Judge Sand observed, 554 F.Supp. at 841 n. 2, a claim that the two defendants together attempted to or did monopolize the cable television industry, would be one of oligopoly under § 1 rather than of monopoly under § 2. *American Tel. & Tel. Co. v. Delta Communications Corp.*, 408 F.Supp. 1075, 1106 (S.D. Miss.1976), *aff'd per curiam*, 579 F.2d 972 (5 Cir.1978), *cert. denied*, 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979). However, he read the complaint as alleging attempted monopolization by each defendant separately as well as a conspiracy between them to restrain trade. Such a reading seems permissible; if not, any defect could readily be cured by amendment.

policy was that it would not sell a particular piece of programming but only programming on a 24-hour a day basis. Defendants had informed independent programming suppliers and system operators that CATEL was a "rip-off" or scam and was a fraud on the public, and that none of the exhibitors would attend. Defendants also threatened that they would no longer purchase programming from those suppliers who attended the show. As a result only 55 companies were exhibitors, only 97 booths were occupied and less than 200 people appeared, in contrast to the 250, 350 and 5,000 that had been expected. As a result defendants had accomplished "their means of driving competitors from the market and of not permitting independent suppliers of stand-alone programming to be solidified into a unit which would attempt to challenge the monopoly created by the defendants." Defendants' illegal acts also forced Crimpers to cease business. The complaint proceeded to make further allegations in support of the claim of monopolization and sought treble damages and injunctive relief. Defendants moved under Fed.R.Civ.P. 12(b)(6) to dismiss the complaint, which also contained counts making a tying claim under § 1 of the Sherman Act and § 3 of the Clayton Act, and various state law claims. The judge denied the motion except for the tying claim and some of the state law claims.

With respect to the claims under §§ 1 and 2 of the Sherman Act, the judge began by explaining that the courts have grafted a doctrine of standing on the sweeping language of § 4 which confers a cause of action upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." He noted that this circuit had adopted the so-called "target-area" test, citing *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971), and *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir.1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972). He said that "[u]nder this test, the plaintiff must either be the 'direct target' of the antitrust violation or fall within the 'target

area' of the alleged antitrust violation—that sector of the economy which is endangered by a breakdown of competitive conditions in the particular industry." 554 F.Supp. at 842. He noted defendants' argument that Crimpers did not directly compete with them in buying and selling cable programming; that their activities aimed only at such competitors; and that Crimpers was only incidentally harmed. After canvassing further elaborations of these arguments, the court found the case distinguishable from *Billy Baxter* and *Calderone* because defendants "took 'direct aim' at Crimpers and its trade show." *Id.* at 844.

Judge Sand then stated that whatever doubts he might have had with respect to plaintiff's standing under *Billy Baxter* and *Calderone* were dispelled by the Supreme Court's decision in *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), discussed below, which he viewed as adding "significant gloss to the line of Second Circuit cases interpreting [the target area test's] application, and appears to signal a rather broader reading of the standing requirements under Section 4 of the Clayton Act." 554 F.Supp at 845. He thought, correctly in our view, that "[a]t a minimum, it now seems clear that, as a rule, a plaintiff need not be a direct competitor in the market in which defendants operate," *id.*, since McCready was a consumer and the defendants were the Blue Shield of Virginia and the Neuropsychiatric Society of Virginia, Inc. Just as the Blue Cross' refusal to honor McCready's bill for treatment by a psychologist was a means to defendants' objective to drive out psychologists in favor of psychiatrists, so the destruction of Crimpers' trade show, which was designed "to keep buyers and sellers of cable programming from transacting business face-to-face," was a means to eliminate competition by producers in dealing with television stations. *Id.* at 846. For these and other reasons discussed in his persuasive opinion, the judge found that Crimpers had standing under § 4 of the Clayton Act to bring its conspiracy and attempted monopolization claims under §§ 1 and 2 of the Sherman Act and denied defendants' motion to dismiss these. However, on motion by the defendants, he certified, under

28 U.S.C. § 1292(b), that his decision involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation, and another panel of this court granted leave to appeal.

DISCUSSION

Subsequent to the ruling below the Supreme Court handed down another decision under § 4 of the Clayton Act, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, ___ U.S. ___, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), in that instance denying standing. In their briefs to this court, defendants treat *Associated General* as having taken a narrower view of standing than *McCready*, they also repeat the distinctions of *McCready* and their reliance on *Billy Baxter* and *Calderone* which they had unsuccessfully asserted in the district court. We consider that Crimpers' case, rather than being distinguishable from McCready's in a sense favorable to the defendants, is stronger for the plaintiff, and that *Associated General* indicates no departure from *McCready* in any fashion pertinent to this case.

Defendants' battle plan, here as in the district court, is to argue first that plaintiff lacks standing under this court's target area test, and second to contend that *McCready* and *Associated General* endorsed this approach. This is not the proper method of analysis. With two recent elaborate Supreme Court opinions with respect to the scope of § 4 of the Clayton Act on the books, courts in this circuit should start their analysis of standing under § 4 with the Supreme Court opinions rather than engage in extensive parsing of *Billy Baxter* and *Calderone*.[2] The "target area" test embodied in those decisions was adopted over powerful dissents, has proved difficult to apply, and is received tepidly in the leading treatise, 2 Areeda & Turner, Antitrust Law § 334d, at 165-68 (1978). *See also* Berger & Bernstein, *An Analytical*

2. By the same token, we do not think it useful to discuss the multitude of decisions in other circuits prior to *McCready* and *Associated General*, none directly in point, which defendants have cited.

Framework for Antitrust Standing, 86 Yale L.J. 809, 830 (1977) ("The target area approach is riddled with inconsistencies."). While the *McCready* opinion did not disapprove that formulation, it surely did not approve it, see 102 S.Ct. at 2548 n. 14, and the *McCready* result is hard to square with it, since the "targets" in *McCready* were the psychologists, not their patients. The *Associated General* opinion likewise simply cited the "target area" test as one of many, 103 S.Ct. at 907 n. 33, and, as will be developed later, advised the courts to abstain from black letter rules and to analyze the facts in each case. While we do not hold that *Calderone* or *Billy Baxter* have been drained of their precedential vitality on their own or very similar facts, we think that in approaching new problems, courts of this circuit would do better, indeed are compelled, to follow the approaches adumbrated by the Supreme Court in *McCready* and *Associated General* without concern whether the results are consistent with language in earlier Second Circuit cases.

Justice Brennan's opinion for the Court in *McCready*, after an opening fanfare with respect to the broad scope of § 4 of the Clayton Act, the Court's refusal "to engraft artificial limitations on the § 4 remedy," and its application of the section "in accordance with its plain language and its broad remedial and deterrent objectives," 102 S.Ct. at 2545, recognized that "drawing on statutory policy, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury," *id.* at 2545—46.

The first of these consisted of limitations, manifested in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), designed to prevent double recovery. The Court perceived no such danger in *McCready*, where plaintiff's injury in being denied Blue Cross reimbursement was entirely different from the psychologists' loss of patients who did not display her fortitude in obtaining their services without Blue Cross reimbursement. We can see no danger of double recovery

in recognizing Crimpers' standing. Crimpers' injury from having its trade show destroyed—the expenses incurred in preparing the show, the loss of reasonably anticipated profits from the show, perhaps even the loss of profits reasonably expected for the future—is distinct and different from the losses of producers in getting too little for their programs or of cable television stations in paying too much.[3] To be sure the case is unlike *McCready* in that the defendants here may have to pay Crimpers as well as the producers and the stations if they were to file suit and ultimately prevail, whereas the *McCready* defendants needed only to pay the plaintiff and her class, the psychologists having suffered no damage since the plaintiffs had continued to use them. But this means simply that if defendants had injured only the producers and the stations, the damages would have been less than if, in the course of their allegedly unlawful conduct, they also injured a company like Crimpers which was endeavoring to facilitate direct dealings between the two. This is not the kind of "double recovery" which *Hawaii* and *Illinois Brick* sought to prevent.

Justice Brennan then turned to the second limitation, which he characterized as the "conceptually more difficult question" whether the injuries were "too remote" from the antitrust violation to afford standing. 102 S.Ct. at 2547. After analogizing the concept of remoteness to the "elusive" notion of proximate cause, he stated that courts should "look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4." *Id.* at 2548.

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3. While the complaint does not expressly allege the latter, defendants' brief concedes that the stations would have a cause of action under § 4 if defendants had restrained competition by the independent producers in selling directly to them, with attendant "increased distribution costs of purchasing 'packaged' programming from HBO and Showtime instead of buying programming directly from the producers on a 'stand-alone' basis". Brief for Appellants at 24—25. Any defect in alleging this could readily be cured by amendment.

Crimpers easily surmounts the first hurdle. The alleged violations were defendants' conspiring to interpose barriers against direct dealings between the producers and the stations and attempting to monopolize the business of furnishing programs. Crimpers got in the way and defendants allegedly made it suffer for trying to do so.

The second test is likewise satisfied. Defendants concede that their alleged activities were within the concern of Congress insofar as they adversely affected the producers or the stations. We see no reason why Congress, had it considered the matter, would not have been equally concerned with protecting a company like Crimpers which undertook to create a business that would have mitigated the precise injury, the limiting of dealings between producers and television stations to those conducted through HBO and Showtime, against which Congress meant to protect. Crimpers was not just a "supplier" of a competitor, to whom standing is generally denied, see 2 Areeda & Turner, *supra*, § 340(e), at 217. It was endeavoring to forge a link in a chain of the sale of programming, to wit, direct contact between program producers and cable television stations, that would compete with defendants in their role as middlemen. The injury to Crimpers was not a "remote" consequence of defendants' acts as would have been the case, for example, if the low prices allegedly paid by them had put a producer out of business and a supplier of the producer sued under § 4. In such cases the injury to the supplier is simply a consequence of the injury to the producer; Crimpers' case is more like (although stronger than) a boycott of a supplier intended to further the conspirators' restraint of trade and stifling of competition.

Injury to Crimpers was the precisely intended consequence of defendants' boycott; with respect to that act the injury to Crimpers was even more "direct" than to the producers or stations who defendants concede would have standing. Just as McCready's injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," 102 S.Ct. at 2551, so Crimpers' injury was inextricably

intertwined with the injury the defendants sought to inflict on producers and television stations in the cable television programming market. Under such circumstances, as Justice Brennan explained in *McCready*, *id.* at 2549, the principle of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977), does not apply. Indeed, Crimpers' case is not only *a fortiori* to McCready's, since the defendants had Crimpers directly in mind, but *a multo fortiori* to the hypothetical put by Justice Brennan in a footnote:

> If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

102 S.Ct. 2551 n. 21.[4]

We see no basis for believing that the position taken in *McCready* was altered in *Associated General, supra*, 103 S.Ct. 897, decided after Judge Sand had rendered his opinion here. All the Justices who concurred in the majority opinion in *McCready* joined in *Associated General* except Justice Marshall, who would have upheld standing in the later case as well. Although Justice Stevens, the writer of *Associated General*, had filed a separate

4. This hypothetical also answers defendants' argument, mentioned above, that *McCready* turned on the fact that, because of the willingness of McCready and her class to continue treatment by psychologists without Blue Cross reimbursement, the psychologists suffered no injury—in other words that antitrust defendants stand better where their boycott fails, than where it succeeds. Brief for Appellants at 41-42. Justice Brennan seems to have contemplated that the boycott in the hypothetical succeeded, i.e., the banks ceased making loans to pychologists with consequent injury both to the psychologist from loss of borrowing power and to the bank from loss of their business. Justice Rehnquist, dissenting, agreed that the bank in the hypothethical had standing, 102 S.Ct. at 2554 n. 7, but predicated this on the impairment of its ability to compete with other banks, a basis which the majority evidently did not find convincing.

dissent in *McCready*,[5] he quoted from the *McCready* opinion, 103 S.Ct. at 907, followed it in analogizing the quest of federal judges for a workable interpretation of § 4 of the Clayton Act to "the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' " *Id.* (footnote omitted), and plainly felt bound by its result, *id.* at 909.

Plaintiffs in *Associated General* were two unions (the Union) representing more than 50,000 individuals employed by the defendants in various phases of the construction business throughout California. The defendants were Associated General Contractors of California, Inc. (Associated), a membership corporation composed of some 250 members, and 1,000 unidentified co-conspirators. The Union and Associated were parties to collective bargaining agreements; some 3,000 contractors who were not members of Associated had entered into separate memorandum agreements binding themselves to the terms of the master collective bargaining agreements. Justice Stevens noted that "[t]he most specific allegations relate to the labor relations between the parties", *id.* 103 S.Ct. at 900 (footnote omitted). He characterized "[t]he complaint's description of actions affecting nonparties" as "both brief and vague," *id.* These included encouraging non-members of Associated to enter into collective bargaining relationships with the Union; encouraging and indeed coercing, see *id.* at 901 n. 3, owners of land and other letters of construction contracts to hire contractors and subcontractors who did not have collective bargaining agreements with plaintiffs; and encouraging and coercing, see *supra*, members and non-members of Associated and memorandum contractors to enter into agreements with subcontractors who had no collective bargaining agreements with the Union.

Justice Stevens began his discussion by observing that "the Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws," *id.* at 902, and that

5. Insofar as the dissent rested on the ground that "[i]f respondent's antitrust claim is that petitioners have engaged in an unlawful boycott, it therefore is manifest that respondent is not the boycottee," 102 S.Ct. at 2556 n. 5, it would be inapplicable here.

this was also true with respect to the claim that defendants encourage non-members not to enter into collective bargaining relationships with the Union, *id.* at 903. This left only the allegations that defendants coerced landowners and others who let construction contracts and general contractors to divert business to non-union firms, with consequent loss of business to unionized firms. Recognizing that firms thus losing business might have antitrust claims, the Court then addressed the question whether the Union had such a claim, *id.* at 903-04. After an extensive review of the legislative history of § 7 of the Sherman Act (the predecessor of § 4 of the Clayton Act), the common law decisions antedating it, the early decisions thereunder, and the more recent course of decisions in the Supreme Court and the lower courts, Justice Stevens concluded that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case," *id.* at 908 (footnote omitted), and adjured lower courts to "analyze each situation in light of the factors set forth in the text *infra*," *id.* n. 33.

Justice Stevens conceded that "[t]he complaint does allege a causal connection between an antitrust violation and harm to the Union and further alleges that the defendants intended to cause that harm," *id.* at 908. However, "[a] number of other factors may be controlling", *id.*, and ultimately were found to dictate dismissal of the Union's claim.

The first of these was "the nature of the plaintiff's alleged injury." Here Justice Stevens relied on his discussion of the legislative history to support the conclusion that "the Sherman Act was enacted to assure customers the benefit of price competition", *id.*, and went on to state that "our prior cases", including *McCready*, "have emphasized the central interest in protecting the economic freedom of participants in the relevant market," *id.* at 909 (footnote omitted). Whereas McCready was a direct victim of defendants' conspiracy to restrain competition by psychologists with psychiatrists, the Union's harm resulted from defendants' efforts to thwart its objective of excluding non-union labor and this was a "labor-market" rather than an antitrust

injury.[6] Here Crimpers claims to be a victim of HBO's and Showtime's conspiracy to prevent direct dealing between producers and television stations by boycotting CATEL.

A second factor against recognition of the Union as a § 4 plaintiff was the indirectness of its injuries, these being only a result of the harm directly inflicted on unionized contractors and subcontractors and their employees, *id.* at 910-11 & nn. 46 and 47. Here, as in *McCready*, plaintiff's injury could hardly have been more "direct." It is true, as defendants argue, that direct dealing between producers and television stations would not necessarily take the form of patronizing Crimpers' trade show. But this would be a question of evidence and the amount of damages, particularly if Crimpers should assert damages for loss of future profits, not a basis for dismissal under Fed.R.Civ.P. 12(b)(6).

A third factor in rejecting the Union's claim was that

> [t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general.

103 S.Ct. at 911 (footnote omitted). Conceding that producers or television stations could sue for restraints illegally imposed on dealing between them, defendants urge this as a factor in their favor. Again there are a number of answers. First, Crimpers is not a "remote" party but was the immediate object of defendants' boycott. Second, despite their standing, the producers and stations would be hard put to establish just what damage they had

6. Emphasizing a statement made by Justice Stevens in distinguishing *McCready*, "[i]n this case, however, the union was neither a consumer nor a competitor in the market in which trade was restrained," 103 S.Ct. at 909 (footnote omitted), defendants argue that any enlargement of the category of § 4 plaintiffs wrought by *McCready* was limited to consumers and that Crimpers was not a consumer. There are two answers: First, although McCready was a consumer, the opinion was not so limited, as witness the bank hypothetical in footnote 21 of the Court's opinion discussed above. Second, Crimpers was "a competitor in the market in which trade was restrained" in the sense that its trade show would have served to facilitate the direct dealing between producers and televisions stations which defendants sought to prevent.

suffered from inability to participate in Crimpers' show. Third, Crimpers *is* the most logical plaintiff to sue for the injury here alleged in the boycott of its trade show—as distinguished from the more general conspiracy to prevent direct dealings between producers and television stations.

A fourth factor militating against the Union's standing in *Associated General* was the speculative character of its damage claim, on which the Court elaborated. *Id.* 103 S.Ct. at 911. As previously developed, Crimpers' damage claim is little more speculative than was McCready's. Its expenses in preparing CATEL are easily determinable, and its expected profits from this and future shows should be provable under the liberal principles long recognized in antitrust cases. See *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 405, 71 L.Ed. 684 (1927); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed. 652 (1946); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S.Ct. 1562, 1576-77, 23 L.Ed.2d 129 (1969).

A final factor working against the Union's standing in *Associated General* was the difficulty in disentangling its damages from other damages resulting from defendant's conduct in order to avoid the danger of double recovery. 103 S.Ct. at 911-12. In our analysis of *McCready* we have demonstrated that no such problem exists here. Defendants argue further that a successful suit by the cable operators would deprive HBO and Showtime of any illegal fruits they might have gained from imposing increased distribution costs whereas Crimpers' damages are totally unrelated to such benefits. This misapprehends the function of a §4 action which is to recompense a victim for his damages, not simply to strip a violator of his rewards.

In sum, despite the able presentation by defendants' counsel, we are unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under §4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without

paying tribute to the defendants. The contrary view would run counter not only to the two most recent decisions of the Supreme Court but to elementary common sense. Indeed, if we should free ourselves from the miasma of adjectives that has accumulated around the words of §4, this case would seem to be a paradigm of standing.

Affirmed.

Crimpers Promotions, Inc.
v. HBO
83-7364
I concur
W.F.
12/5/83

Crimpers Promotions, Inc.
v. HBO
83-7364
I concur
GCP
12/7/83

Appendix B

No. 81 Civ. 7325 (LBS).

UNITED STATES DISTRICT COURT,
S.D. New York.

Dec. 30, 1982.

CRIMPERS PROMOTIONS, INC.,
Plaintiff.

v.

HOME BOX OFFICE, INC. and
SHOWTIME ENTERTAINMENT CORPORATION,
Defendants.

Jerry I. Lefkowitz, Forest Hills, N.Y., for plaintiff.

Cravath, Swaine & Moore, New York City, for defendant Home Box Office Inc.; Robert D. Joffe, New York City, of counsel.

Hughes, Hubbard & Reed, New York City, for defendant Showtime Entertainment Corp.; John Donovan, New York City, of counsel.

OPINION

SAND, District Judge.

Defendants Home Box Office Inc. ("HBO") and Showtime Entertainment Corporation ("Showtime") move to dismiss the claims of plaintiff Crimpers Promotions Inc. ("Crimpers") pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Crimpers alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14, as well as a number of violations of New York tort and unfair competition law. We find

that plaintiff's complaint states a valid cause of action for conspiracy to restrain trade and attempted monopolization under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, and therefore deny defendants' motion with respect to Counts I and II of the complaint. We find, however, that plaintiff fails to plead adequately a tying claim under Section 1 of the Sherman Act and Section 3 of the Clayton Act and therefore grant defendants' motion with respect to this claim without prejudice to the filing of an amended complaint. With respect to the state claims, we find that plaintiff has stated valid causes of action for tortious interference with prospective business advantage and contractual relations. We dismiss plaintiff's unfair competition and prima facie tort claims.

FACTS

Plaintiff is a New York corporation organized in 1980 for the initial purpose of producing, managing and operating a cable television trade show known as Catel Expo-Programming Sources '81 ("Catel") that was to take place in Las Vegas, Nevada in September, 1981. The purpose of the Catel show, as set forth in plaintiff's complaint, was to provide a forum in which independent producers and suppliers of cable television programming could meet and transact business with prospective purchasers of such programming, such as cable television networks.[1]

The defendants, HBO and Showtime, are two of the leading companies in the cable television industry. Both HBO and Showtime purchase programming from independent producers and suppliers and package this programming into a complete network format for sale to cable system operators. The cable operators, in turn, transmit the HBO and Showtime network

1. Plaintiff defines programming as "anything a system operator sends out over his or her wire including, but not limited to movies, sports and other entertainment organized in a complete network format or offered on a stand-alone basis: news, weather and business information; educational courses, home security, transactional and other interactive programming services." Complaint ¶ 6(d). "Stand-alone" programming refers to the practice whereby a cable operator acquires programming directly from a producer or supplier and schedules it for transmission to subscribers.

programming to their home television subscribers. (HBO and Showtime also produce some of their own programming.) Plaintiff alleges that HBO and Showtime are the dominant forces in the cable pay-television industry, with thousands of affiliate networks and over ten million subscribers throughout the United States. Complaint ¶¶ 7(c)-(f); 8(c)-(e); 9(c).

The essence of plaintiff's complaint is that HBO and Showtime have monopolized or attempted to monopolize the cable television industry, and have used this monopoly power to cause plaintiff's trade show to be a financial failure. The complaint alleges that HBO and Showtime conspired to boycott plaintiff's trade show, and exerted their monopoly power in the cable industry to coerce other independent programmers, suppliers, and potential purchasers of programming to do likewise.[2] According to Crimpers, HBO and Showtime boycotted and attempted to ruin the Catel show for fear that its success would provide a forum in which independent buyers and sellers of cable programming could transact business face-to-face, reducing or eliminating much of defendants' economic power in the cable industry. HBO and Showtime are alleged to act as middlemen in the cable industry, purchasing large amounts of programming from independent producers at artificially low prices, arranging the programming into a network format, and then reselling it as a package to cable networks for transmission to subscribers. Plaintiff alleges that independent buyers and sellers of programming are kept from trading on a "stand-alone" basis (see fn. 1, *supra*) because of defendants' power as middlemen. Complaint ¶¶ 9(d); 19; 24(g).

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2. To the extent that plaintiff is alleging that defendants as a group attempted to or have monopolized the cable industry, this is a claim of oligopoly, and is not cognizable under Section 2 of the Sherman Act. *American Telephone and Telegraph Co.* v. *Delta Communications Corp.*, 408 F.Supp. 1075, 1106 (S.D.Miss. 1976), *aff'd per curiam*, 579 F.2d 972 (5th Cir. 1978), *cert. denied sub nom. Delta Communications Corp.* v. *National Broadcasting Co.*, 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979). We read plaintiff's complaint, however, as alleging: (1) conspiracy to restrain trade on the part of HBO and Showtime together; and (2) attempted monopolization or monopolization on the part of each defendant separately.

More specifically, plaintiff alleges that HBO and Showtime, after expressing initial interest in the Catel show, decided to withdraw from participation. According to the complaint, the defendants informed independent suppliers and systems operators that plaintiff's show was a "rip-off" and a "fraud on the public," and that they should not attend. More importantly for our purposes, Crimpers alleges that the defendants conspired together and exerted their individual monopoly power to coerce independent suppliers of programming not to appear at Catel by threatening that were they to do so, defendants would no longer purchase their programming. Complaint ¶¶ 13, 14, 19-22.

Plaintiff contends that, as a result of these actions, defendants have reduced competition in the markets for the sale and purchase of programming for cable television, and have prevented independent producers and suppliers from transacting business with potential purchasers on a stand-alone basis at trade shows like the one organized by the plaintiff. Prior to defendants' alleged conspiracy, Crimpers anticipated that more than 250 companies would participate in its trade show. Plaintiff contends that as a result of defendants' actions, only 200 people attended and only 55 companies participated, occupying fewer than one hundred booths. Plaintiff was unable to obtain sufficient exhibitors and attendees for its trade show, continues to be unable to do so, and has been forced to cease business. Plaintiff seeks injunctive relief and treble damages.

STANDING

Defendants argue that, even if we assume plaintiff's allegations to be true as we must on this motion to dismiss, Crimpers is not a proper party to bring these antitrust claims because it lacks standing. To sue under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act plaintiff must meet the requirements of Section 4 of the Clayton Act, 15 U.S.C. §15. Section 4 provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" shall have a cause of action for treble damages. Despite this

sweeping language, the courts have been unwilling to grant relief to all plaintiffs alleging injury resulting from an antitrust violation. Rather, the courts have grafted a doctrine of standing onto the statute that requires that the defendant's violations have been the proximate or legal cause of plaintiff's injury.

Although the language employed to describe the standing requirement differs among the Courts of Appeals, *compare, e.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir.1971) ("target area" test), *with Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90 (3d Cir.1977) ("totality of the facts" test), and remains somewhat in flux, *see generally* Berger & Bernstein, *An Analytic Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977), the Second Circuit utilizes the so-called "target area" test. Under this test, the plaintiff must either be the "direct target" of the antitrust violation or fall within the "target area" of the alleged antitrust violation—that sector of the economy which is endangered by a breakdown of competitive conditions in the particular industry. *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir.1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir.1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877, 27 L.Ed.2d 826 (1971). That is, the causal connection between the plaintiff and the alleged antitrust violation must be such as to "link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect." *Billy Baxter*, 431 F.2d at 187. Defendants rely on the leading cases of *Calderone, supra*, and *Billy Baxter, supra*, to support their argument that Crimpers was neither the "direct target" nor within the "target area" of the alleged conspiracy.

The plaintiff in *Billy Baxter* was the franchisor of a line of carbonated beverages marketed under the "Billy Baxter" trademark. Plaintiff also licensed information and supplied ingredients necessary for the manufacture of Billy Baxter beverages, but was not involved in its actual production or distribution. Billy

Baxter sued Coca-Cola and Canada Dry, alleging that they had restrained competition in the "nonalcoholic carbonated beverage industry" in violation of the antitrust laws by inducing beverage retailers and distributors to cease purchasing Billy Baxter products from plaintiff's franchised bottlers. 431 F.2d at 184-87. The Second Circuit held that plaintiff was without standing to bring its Sherman Act claim because it was neither the direct target nor within the target area of the violation. Plaintiff did not engage in or compete with the defendants in the marketing of carbonated beverages, and therefore was not within that sector of the economy threatened by the breakdown in competition—the so-called target area. Moreover, the harm plaintiff incurred was indirect and incidental—a reduction in franchise royalties due to its franchisee's decreased sales. Plaintiff was not the direct target of the defendants' alleged violation. The court concluded that "[a]n interference with the marketing of beverages may interrupt profitable relationships and thereby harm a party which in effect 'markets' franchises and ingredients, but the connection is not sufficiently compelling to support a treble damage suit." *Id.* at 189.

The Second Circuit employed a similar analysis in *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir.1971), *cert. denied*, 406 U.S. 930, 92 S.Ct. 1776, 32 L.Ed.2d 132 (1972). In that case, the plaintiff leased motion picture theatres to exhibitors in return for a fixed rent plus a percentage of the gross receipts from the exhibition of movies. Plaintiff alleged that the defendant motion picture exhibitors and distributors had engaged in a conspiracy to reduce competition by agreeing to divide local movie theatres into separate "tracks", and then allocating first-run movies among these tracks, thereby eliminating competition among theatres. Were it not for this conspiracy, the plaintiff argued, the theatres it owned would book a larger number of first-run movies and its rent, based on a percentage of gross receipts of its lessee, would have increased. In denying standing to the plaintiff, the court observed:

> "In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves."

454 F.2d at 1295. The conspiracy alleged in *Calderone* was aimed at competing movie distributors and exhibitors, not at the plaintiff theatre owner. Plaintiff was not, therefore, within the relevant "target area." Those who competed with the defendants in the exhibition and distribution of movies had standing to bring suit for the alleged conspiracy, not the plaintiff. *Id.* at 1296-97.

HBO and Showtime argue that Crimpers is in the same derivative position with respect to the defendants' alleged activities as the plaintiffs in *Billy Baxter* and *Calderone*. First, they note that Crimpers does not directly compete with defendants in the buying and selling of cable programming. The defendants view their alleged actions as aimed at other competitors and not at Crimpers, which is solely in the trade show business.[3] The fact that Crimpers might have incurred significant harm as a result of their alleged unlawful business behavior does not, according to the

3. In an affidavit submitted to the Court along with its reply brief, plaintiff attempts to establish facts that would qualify it as a direct competitor of HBO and Showtime in the purchase and sale of cable programming. Plaintiff suggests that an amendment of its complaint to include such facts would cure any standing problems. Even if we were to consider plaintiff's affidavit on this 12(b)(6) motion to dismiss, we find plaintiff's participation in the buying and selling of programming to be de minimus. Moreover, the injuries for which plaintiff seeks damages occurred in its role as a trade show operator, not as a potential lessee of a trade show booth. For these reasons, we do not consider plaintiff a direct competitor with defendants in the purchase and sale of cable programming for purposes of this motion and any amendment of the Complaint to such effect would fail to cure plaintiff's standing problems in this regard.

defendants, place the plaintiff within the target area of that behavior; they suggest that only those entities that directly compete in these markets would have standing to bring suit. Defendants' Memorandum in Support of Their Motion to Dismiss ("Defendants' Memorandum"), at 14-15. Nor does the fact that Crimpers may have incurred significant harm transform it into a direct target of defendants' alleged conspiracy. Rather, plaintiff is simply an incidental victim, harmed only as a result of its relationship with the direct targets of the conspiracy, defendants' competitors. Because plaintiff is only incidentally harmed, it is no more entitled to standing under the antitrust laws than is the theatre lessor in *Calderone*, the franchisor in *Billy Baxter*, or any other supplier, creditor or employee whose profits rise and fall with the fortunes of a direct target of an alleged antitrust conspiracy.

Furthermore, even if Crimpers was a direct target of the alleged conspiracy, defendants contend it would still lack standing because it was outside the target area and did not incur direct injury. Defendants' Memorandum, at 14-15 and n. *; *see Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F.Supp. 1150, 1160 (S.D.N.Y. 1979), *aff'd*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981). Defendants contend that plaintiff's injuries can only be determined through a "tenuous and tortured line of reasoning." Defendants' Memorandum, at 17.

Finally, defendants contend that the alleged destruction of plaintiff's trade show was simply a *means* to their ultimate goal of restraining trade in the cable television industry. According to defendants, parties that are adversely affected by the means of achieving an anticompetitive goal but that are not directly affected once the goal is reached are without standing because their injury is "incidental to the accomplishment of the illegal object." Defendants' Memorandum at 23 (citing *Conference of Studio Unions* v. *Loew's*, 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952)).

Despite defendants' arguments, we do not think *Billy Baxter* and *Calderone* compel the dismissal on the grounds of standing of

Crimpers' Section 1 conspiracy claim or its Section 2 attempted monopolization claim. Defendants' characterization of plaintiff as outside the "target area" of the alleged violation, and their labelling of plaintiff's alleged injury as "incidental" rather than "direct" provides no "talismanic guide[] to decision," for these terms only indicate "the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities." *Billy Baxter*, 431 F.2d at 187; *see Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 631 F.2d at 12. When we focus on the specific contents of plaintiff's allegations, and the relation of its alleged injuries to the defendant's actions, we find this case to be more problematic than either *Billy Baxter* or *Calderone*. In *Billy Baxter*, the plaintiff was two steps removed from the alleged boycott. The defendants in that case allegedly coerced retailers into refusing to buy Billy Baxter beverages from wholesale bottlers and manufacturers. As the wholesalers' profits declined, so did the profits of the plaintiff franchisor. In the instant case, the intermediate actor (the wholesaler) is missing. The allegation is that the defendants conspired together to boycott plaintiff's trade show directly and used coercive tactics to force their suppliers and competitors to follow suit. By contrast to the situation in *Billy Baxter*, the plaintiff's alleged injuries in this case are not merely derivative of a boycott taking place at another level of production.

Calderone is also distinguishable. In that case, there was no evidence that the alleged conspiracy was in any sense directed at the particular plaintiff. The plaintiff was just one of any number of actors that arguably were harmed by the defendants' alleged actions. The defendants in this case, by contrast, took "direct aim" at Crimpers and its trade show. Where a defendant aims its conspiracy at a clearly identifiable target, that target is sufficiently connected to the defendant's allegedly unlawful behavior so as to have standing under Section 4 of the Clayton Act. *See Calderone*, 454 F.2d at 1296 n. 3 ("If Calderone had alleged . . . that the defendants had aimed their conspiracy at it . . . Calderone would be in a different posture.").

Whatever doubts we might have entertained with respect to the validity of plaintiff's claim under *Billy Baxter* and *Calderone* were dispelled by the Supreme Court's decision last term in *Blue Shield of Virginia* v. *McCready*,—U.S.—, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). The plaintiff in that action brought suit under the antitrust laws alleging that Blue Shield and the state psychiatric society had engaged in an unlawful conspiracy to exclude psychologists from receiving compensation under Blue Shield's health benefits plan. Under its plan, Blue Shield reimbursed subscribers for part of the cost of outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield only reimbursed subscribers for treatment by psychiatrists; the plan did not reimburse for services provided by psychologists unless treatments were under the supervision of a physician. The district court granted defendants' motion to dismiss, ruling that the plaintiff, a subscriber under the plan, stood outside the "target area" of the alleged conspiracy and was therefore without standing to sue. The Fourth Circuit reversed, 649 F.2d 228 (4th Cir.1981), and the Supreme Court affirmed.

In granting the plaintiff standing to sue under Section 4 of the Clayton Act, the Court began by noting that the availability of the antitrust remedy was not a question of the specific intent of the conspirators. _____ U.S. at _____, 102 S.Ct. at 2548-49. The Court than proceeded to analyze McCready's claim:

> McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready . . . was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely " 'the type of loss that the claimed violations . . . would be likely to cause.' "

Id. (citations omitted).

Although the Court explicitly declined to evaluate the utility of the target area test, *id.* at — n. 12, 102 S.Ct. at 2547 n. 12, *McCready* nevertheless adds a significant gloss to the line of Second Circuit cases interpreting its application, and appears to signal a rather broader reading of the standing requirement under Section 4 of the Clayton Act. At a minimum, it now seems clear that, as a rule, a plaintiff need not be a direct competitor in the market in which defendants operate, *see Aurora Enterprises, Inc. v. National Broadcasting Co.*, 688 F.2d 689, 692-93 (9th Cir. 1982), as a number of Second Circuit cases seem to suggest, *see, e.g., Western Geophysical Co. v. Bolt Associates, Inc.*, 584 F.2d 1164, 1175 (2d Cir.1978). The fact that Crimpers does not directly compete with the defendants in the purchase and sale of cable programming is therefore not dispositive: McCready herself did not compete with the psychiatrists alleged to have conspired with Blue Cross to restrain trade in the psychotherapy market. Nor can our decision turn on the fact that the destruction of plaintiff's trade show was arguably only a means by which defendants sought to restrain trade. It was never suggested in *McCready* that the refusal to reimburse subscribers for psychology services was any more than a mere means to further the defendants' goal of reducing competition in the market for psychotherapy services. As for the defendants' assertion that plaintiff's damages are speculative and derivative in nature, it seems clear that the alleged injuries to Crimpers are arguably far more direct and easier to ascertain than those incurred by any one of defendants' direct competitors. Were plaintiff to show, for example, that as a result of defendants' actions, certain specific companies that had intended to attend plaintiff's trade show decided instead to boycott it, the calculation of damages would be a relatively simple matter. By contrast, one of defendants' direct competitors in the purchase of cable programming (who, according to defendants, would have standing to sue) would have a more difficult time quantifying the harm it incurred on account of an

overall reduction in competition. This is not a case like *Calderone, supra*, in which a remotely situated person suffers damages that are much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. *See Calderone*, 454 F.2d at 1295. It is Crimper's damages, not those of defendants' direct competitors, that are direct and quantifiable in this case.

McCready supports this analysis. In that case, psychologists were paid directly by the Blue Cross subscribers who sought their services. Thus, the harm inflicted upon them by defendants' alleged conspiracy was of an indirect nature—the potential business they lost due to the fact that subscribers who sought their services would not be reimbursed by Blue Cross. "But for" defendants' conspiracy, more subscribers might have chosen psychologists over psychiatrists and, as a result, the psychologists might have received more business. McCready, by contrast, was directly injured, in that she was not reimbursed for the psychologist's bills she had already paid. Like McCready, Crimpers bears the immediate and direct impact of defendants' alleged boycott. Defendants' direct competitors suffer indirectly by a reduction in competition. If defendants' competitors would have standing on the basis of these rather indirect and difficult to ascertain injuries, as defendants suggest, then surely Crimpers has standing.[4]

4. Justice Brennan posed the following hypothetical in his opinion for the Court in McCready:

> If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed. . . . Because McCready is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, McCready's participation in the market for psychotherapeutic services provides precisely that significance. _____ U.S. at _____ n. 21, 102 S.Ct. at 2551 n. 21. We find Crimpers to be

Defendants contend nevertheless that *McCready*, decided subsequent to the making of this motion, supports their position that Crimpers is without standing. They argue that defendants' goals regarding the cable industry "could have been served only in the most indirect and remote way" by their alleged boycott of Crimpers' trade show. And it would be misconstruing the facts, according to defendants, to describe the alleged boycott and conspiracy as "inextricably intertwined" with the defendants' alleged goal—the restraint of trade in the buying and selling of cable television programming.

We find defendants' arguments unpersuasive. Crimpers is only slightly more remote a plaintiff for purposes of its Section 1 and 2 claims than the plaintiff in *McCready*. The alleged goal of defendants' conspiracy in this case was to keep buyers and sellers of cable programming from transacting business face-to-face. In furtherance of this goal, defendants are alleged to have conspired to boycott this specific trade show and to have coerced their competitors and suppliers into doing the same. Under these facts, Crimpers was no mere supplier or customer, tangentially related to the goal of the conspiracy. As in *McCready*, the boycotting and intended destruction of plaintiff's trade show was one of the clearest and most direct means by which to achieve defendants' alleged goal of restraining trade in the buying and selling of cable programming on a stand-alone basis. In accord with *McCready*, we find that Crimpers is " 'within that area of the economy . . . endangered by [a] breakdown of competitive con-

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in a situation not unlike that of the bank and McCready. While Crimpers does not compete directly with the defendants, and while competition in the market for trade shows is minimally affected by defendants' actions, Crimpers nevertheless is directly harmed by defendants' alleged attempted monopolization, conspiracy and boycott; and its intimate connection to the market for the buying and selling of cable programming makes its injury peculiarly significant in light of defendants' alleged goal of restraining trade in this market. Crimpers is no mere supplier or creditor, with the cable industry serving as only one of a number of its customers. Rather, given its stated purpose, it is inextricably connected to the industry, its entire existence depending on the competitive health of the market for the buying and selling of programming among independent dealers.

ditions'" resulting from defendants' alleged boycott. *McCready*,—U.S. at —, 102 S.Ct. at 2549 (citation omitted). For this reason, we find that plaintiff has standing under Section 4 of the Clayton Act to bring its conspiracy and attempted monopolization claims under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.

THE CONSPIRACY AND BOYCOTT CLAIMS

Defendants contend that even if plaintiff has standing, it has failed properly to allege a conspiracy, a necessary component of a Section 1 claim under the Sherman Act. *See Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 78 (2d Cir.1980), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 639, 70 L.Ed.2d 618 (1981). As defendants read the complaint, plaintiff has alleged only unilateral action on the part of each of the defendants in deciding not to attend Crimpers' trade show. In the absence of a showing of agreement, unilateral action for legitimate business purposes is not a violation of the antitrust laws. *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). Defendants contend that they are entitled to more than the conclusory language contained in the complaint that HBO and Showtime "conspired to restrain trade."

We find that plaintiff's complaint sets forth more than enough by way of alleged facts to apprise defendants of the claims they face, and from which to infer the possibility of concerted action. Plaintiff sets out quite clearly that the defendants conspired between themselves to restrain trade in the buying and selling of cable television programming and that they attempted to coerce competitors into boycotting Crimpers' trade show. Under these circumstances, we are most reluctant to dismiss the complaint at this stage of the litigation, where there has been no discovery and where motive and intent play so great a role. *See Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.ED.2d 458 (1962); *Schulman* v. *Burlington Industries, Inc.* 255 F.Supp. 847, 850-51 (S.D.N.Y.1966). We cannot say that it appears to a certainty that plaintiff would not be entitled to relief under any set of facts which could be proved in support of its

Section 1 conspiracy claim. 2A Moore's Federal Practice ¶ 12.08 (2d ed. 1982).

THE MONOPOLIZATION CLAIM

We also find that plaintiff has stated a valid cause of action for attempted monopolization under Section 2 of the Sherman Act. In order to state a claim for relief under Section 2, plaintiff must allege (1) a " 'dangerous probability of success' in monopolizing a given product market and (2) a specific intent to 'destroy competition or build monopoly.' " *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir.1980) (citing *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 153, 72 S.Ct. 181, 186, 96 L.Ed. 162 (1951); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir.1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977)).

Defendants contend that plaintiff has failed to define a product market sufficiently to make out a Section 2 claim under the standards set forth in *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956) (*"Cellophane"*). For purposes of defining a relevant market subject to the restraints on attempted monopolization under Section 2, one looks to commodities that are "reasonably interchangeable" by consumers. *Cellophane*, 351 U.S. at 395, 76 S.Ct. at 1007. Defendants view the commodity that defendants have attempted to monopolize as "movies, sports, and other entertainment" purchased and sold for telecast over cable television networks. *See* n. 1, *supra*. Defendants suggest that this type of programming should be viewed as interchangeable with programming bought, sold and telecast by the major television networks and, indeed, as interchangeable with the viewing of such programming at local movie theaters or on home video recorders. Viewed from this broad prospective, defendants argue that it cannot be asserted in good faith that either defendant has monopolized or is attempting to monopolize so large a market.

We reject defendants' characterization as definitive of the relevant market. The market for the sale of programming for telecast on home television may be rather different than, for example, the market for the sale of programming in the form of movies to local motion picture theaters. Moreover, it is certainly arguable that consumers view the telecast of programming over pay cable television as a distinct commodity from the advertiser-supported programming telecast over the major networks. We find that the market for the purchase and sale of programming by companies like HBO and Showtime for telecast over cable television networks to be at least arguably sufficiently distinct from the purchase and sale of programming for broadcast over the major networks or in movie theaters as to qualify (at this stage of the proceedings) as a market subject to the prohibitions against attempted monopolization under Section 2.

While defendants may show at a later stage of the litigation that plaintiff has failed to set forth adequately a relevant market for purposes of Section 2, we cannot say at this early stage that plaintiff has failed to allege a set of facts that could arguably support a Section 2 claim.

We also find plaintiff's allegation that defendants possess sufficient economic power to coerce suppliers and producers into boycotting its trade show, if proved, sufficient to constitute an allegation of a "dangerous probability of success" in monopolizing the market for the buying of cable television programming. And the facts alleged in support of plaintiff's Section 1 claim are more than sufficient to constitute an allegation of intent to monopolize or restrain competition on defendants' part necessary to satisfy the requirements of a Section 2 claim. We therefore find that plaintiff has stated a claim for attempted monopolization under Section 2 of the Sherman Act, and that plaintiff has standing to sue under this claim. For all the reasons stated above with respect to plaintiff's Section 1 boycott claim, we find plaintiff to lie within the target area of defendants' alleged attempt to monopolize the markets for the sale and purchase of programming for cable television.

TYING CLAIMS

Count III of plaintiff's complaint alleges a tying claim under Section 1 of the Sherman Act and Section 3 of the Clayton Act. Plaintiff alleges that defendants engaged "in the practice of an illegal tie-in and the bundling of programming . . ." to create a vertical integration in restraint of trade. Complaint ¶33(b). Were defendants to succeed in monopolizing the cable industry through such a tying practice, such success would arguably have the same financial impact on Crimpers in the long run as defendants' alleged boycott and attempted monopolization activities. But long-term adverse impact is not the sole criterion for determining standing. Plaintiff does not directly compete with defendants in the selling of programming to networks and subscribers. Nor does it purchase programming from HBO and Showtime, making it subject to the coercive effects of the alleged tying practice. The injuries for which Crimpers seeks damages are first and foremost a result of the alleged boycott of Crimpers' trade show and relate only indirectly to any alleged tying claim. *See* n. 3, *supra*. More importantly, defendants' alleged tying practice is not targeted at Crimpers with the same degree of specificity as is their alleged boycott of the trade show. As to this claim, Crimpers appears to be on the same footing as any number of other producers and suppliers that might be harmed incidentally by defendants' alleged anticompetitive tying practice. Nothing about defendants' tying scheme, if true, appears from the complaint to link it in any unique fashion with Crimpers.

In these respects, we find plaintiff's tying claim to be so vague and inarticulately alleged that it is difficult to understand exactly in what respects Crimpers might arguably stand on a different footing than other potential plaintiffs. We also find that Crimpers has failed to allege with sufficient clarity two distinct products—a "tying" product and a "tied" product. *See Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507, 89 S.Ct. 1252, 1260, 22 L.Ed.2d 495 (1969). Moreover, the tying claim in general is too

vague to provide defendants with sufficient notice as to its grounds to enable defendants to prepare a responsive pleading. *See Mountain View Pharmacy* v. *Abbott Laboratories*, 630 F.2d 1383 (10th Cir.1968). For all these reasons, plaintiff's tying claim is dismissed without prejudice to the filing of an amended complaint within twenty (20) days from the filing of this Opinion alleging with specificity the nature of the alleged tying practice and the basis upon which Crimpers contends that it is affected in such manner as to give it standing.

STATE CLAIMS

Counts IV-VI of Crimpers' complaint set forth pendent claims under New York law for unfair competition, interference with prospective business advantage, prima facie tort and tortious interference with contractual relations. We find that the complaint adequately alleges tortious interference with contractual relations and prospective business advantage. However, plaintiff has failed to state a claim for unfair competition and prima facie tort. To the extent Counts IV-VI assert these claims, they are dismissed.

The essence of a claim for unfair competition under New York law is that a party misappropriate the skill, expenditures and labor of another. *Saratoga Vichy Spring Co.* v. *Lehman*, 625 F.2d 1037, 1044 (2d Cir.1980); *American Footwear Corp.* v. *General Footwear Co.*, 609 F.2d 655, 662 (2d Cir.1979), *cert. denied*, 445 U.S. 951, 100 S.Ct. 1601, 63 L.Ed.2d 787 (1980). As we noted above in our discussion of plaintiff's federal claims, *see* n.3, *supra*, Crimpers does not compete directly with defendants in the markets for the buying and selling of cable programming. There is no claim that defendants misappropriated a property right of the plaintiff for their commercial advantage. *See Flexitized Inc.* v. *National Flexitized Corp.*, 335 F.2d 774, 782 (2d Cir.1964). Nor is there any claim that defendants are "palming off" their product as one manufactured by the plaintiff or that defendants are in any way attempting to confuse the public as to the identity or ownership of the programming they

market. For these reasons, we find that plaintiff has failed to allege any facts upon which plaintiff could base a claim for unfair competition under New York law.

We also find that Crimpers has failed to state a claim for prima facie tort. To plead a cause of action for prima facie tort under New York law, plaintiff must show that the defendant inflicted intentional harm, without cause or justification, by an act or series of actions which would otherwise be lawful. *ATI, Inc.* v. *Ruder & Finn, Inc.*, 42 N.Y.2d 454, 458, 398 N.Y.S.2d 864, 866, 368 N.E.2d 1230, 1232 (1977). Defendant's conduct must have been prompted by a malicious motive unmixed with any other and exclusively directed to injure and damage another. *Korry* v. *International Telephone & Telegraph Corp.*, 444 F.Supp. 193, 195 (S.D.N.Y.1978). The plaintiff must also plead special damages. *Kalso Systemet, Inc.* v. *Jacobs*, 474 F.Supp. 666, 671 (S.D.N.Y.1979).

We note initially that plaintiff has failed to allege special damages with sufficient particularity. Crimpers has claimed general damages of $1,645,000 for lost profits and $19,502,460 for "retarded and impaired financial and technological development." Damage claims of this generality do not constitute an adequate pleading of special damages as required under New York law. Moreover, plaintiff alleges that defendants refused to attend its trade show in part because they thought it was a fraud and were interested in improving their economic position in the cable industry. These allegations contradict the requirement that defendants' sole motivation in boycotting the show was to injure the plaintiff. Finally, we note that a cause of action in prima facie tort is inappropriate when the facts indicate sufficient grounds for causes of action in "traditional tort" such as wrongful interference with contractual relations. *Susskind* v. *Ipco Hospital Supply Corp.*, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dept. 1975). We therefore dismiss plaintiff's prima facie tort cause of action.

We find the complaint sufficient with respect to the pleading of the causes of action for interference with prospective business

advantage and contractual relations. Crimpers alleges facts that, if proved, could arguably support a showing that contracts for the Catel show would have been entered into were it not for defendants' unfair conduct. *Robbins* v. *Ogden Corp.*, 490 F.Supp. 801, 811 (S.D.N.Y.1980). Crimpers' references in ¶¶ 16-18 of its complaint to the number of companies it expected would attend Catel is sufficiently specific to limit the scope of plaintiff's claims, and to provide defendants with notice of the claims against them and an ability to respond and pursue meaningful discovery. While it is true, as defendants point out, that "mere anticipation" of a contract is not sufficient to make out a proper claim for interference with prospective business relations, *see Optivision, Inc.* v. *Syracuse Shopping Center Associates*, 472 F.Supp. 665, 685 (S.D.N.Y.1979), we cannot say at this early point in the proceedings that plaintiff could not prove facts alleged in its complaint that would show a high degree of likelihood that such contracts would have been entered into but for defendants' arguably unlawful actions. And while we recognize that there is no liability for inducing termination of a business relationship before a contract is signed where the defendant's purpose is to advance its own economic self interest, a claim for interference with prospective business relations will lie where the defendant's actions are arguably dishonest, unfair or improper. *Robbins* v. *Ogden Corp.*, 490 F.Supp. at 811.

For these same reasons, we find that Crimpers has also stated a claim for tortious interference with contractual relations. Defendants' primary problem with the pleading of this cause of action appears to lie with plaintiff's failure to plead more specific information, such as the parties to the alleged contracts for the Catel show, the terms of these contracts, and the nature of their alleged breach. Defendants' Memorandum at 60. These deficiencies do not lend a fatal blow to plaintiff's complaint. We find that the plaintiff adequately sets forth facts from which we could find that valid contracts existed that would have been performed were it not for defendants' intentional actions. *Robbins* v. *Ogden Corp.*, 490 F.Supp. at 810.

CONCLUSION

Defendants' motion to dismiss is denied with respect to Counts I and II of the complaint insofar as they state claims for conspiracy in restraint of trade and attempted monopolization under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Defendants' motion is granted with respect to plaintiff's unlawful tying claim with leave to plaintiff to replead this claim within twenty (20) days. Count III of the complaint is hereby dismissed. Insofar as Counts IV-VI of the complaint plead claims for unfair competition and prima facie tort, these claims are dismissed. The motion to dismiss plaintiff's other pendent state claims of tortious interference with contractual relations and prospective business advantage is otherwise denied.

SO ORDERED.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of December one thousand nine hundred and eighty-three.

Present:

HON: WILFRED FEINBERG Chief Judge

HON: HENRY J. FRIENDLY

HON: GEORGE C. PRATT

Circuit Judges,

No. 83-7364

CRIMPERS PROMOTIONS INC.,

Plaintiff-Appellee,

v.

HOME BOX OFFICE, INC. and SHOWTIME ENTERTAINMENT CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO, Clerk

by EDWARD J. GUARDARO,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed Jan. 25, 1984

At a stated term of the United State Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of January one thousand nine hundred and eighty-four.

No. 83-7364

CRIMPERS PROMOTIONS INC.,
Plaintiff-Appellee,

v.

HOME BOX OFFICE, INC., and
SHOWTIME ENTERTAINMENT CORPORATION,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, Home Box Office, Inc., *et. al.*,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk

by VICTORIA C. DALTON,
Deputy Clerk

Appendix D

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO.

PLAINTIFF DEMANDS A JURY TRIAL

CRIMPERS PROMOTIONS INC.,

Plaintiff.

-against-

HOME BOX OFFICE INC. AND SHOWTIME ENTERTAINMENT CORPORATION,

Defendants.

COMPLAINT

Plaintiff, CRIMPERS PROMOTIONS INC., by its attorney, JERRY I. LEFKOWITZ, brings this action against the defendants, HOME BOX OFFICE INC. and SHOWTIME ENTERTAINMENT CORPORATION, and complains and alleges as follows:

JURISDICTION AND VENUE

1. This action arises under the Antitrust Laws of the United States (15 USC) and the laws of unfair competition of the various States and this Complaint is filed, this action instituted, and jurisdiction of this Court is invoked under Sections 4, 7, 12 and 16 of the Clayton Act (15 USC Section 15,18, 22 and 26) 28 USC

Sections 1337 and 1338, and the doctrine of pendent jurisdiction, in order to recover damages for past violations and to prevent and restrain the continuing violation by the defendants of the Sherman Act (USC Sections 1 and 2) and the Clayton Act (15 USC Sections 13 and 14), and the laws of unfair competition.

2. That, upon information and belief, the defendant, HOME BOX OFFICE INC., hereinafter referred to as "HBO", is a domestic corporation of one of the States of the United States of America and, upon information and belief, is duly licensed and authorized as a domestic or foreign corporation to do business in the State of New York and said defendant has its headquarters, office, transacts business, and is found within the Southern District of the State of New York.

3. That, upon information and belief, the defendant SHOWTIME ENTERTAINMENT CORPORATION, hereinafter referred to as "SHOWTIME", is a domestic corporation of one of the States of the United States of America and, upon information and belief, is duly licensed and authorized as a domestic or foreign corporation to do business in the State of New York and said defendant has its headquarters, offices, transacts business, and is found within the Southern District of the State of New York.

4. That the acts alleged in this Complaint to have been done by the defendants were authorized, ordered or done by the officers, agents, employees or representatives of the defendants while actively engaged in the management, direction or control of their affairs.

5. That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business located at 127 North Broadway, Hicksville, New York.

THE PARTIES

6. (a) Plaintiff was incorporated in 1980 under the laws of the State of New York and has an office and place of business in Hicksville, County of Nassau, State of New York.

(b) Plaintiff was formed for the initial purpose of producing, managing and operating a Cable Television trade show known as CATEL EXPO—PROGRAMMING SOURCES '81 in the Las Vegas Hilton Convention Center from September 25-27, 1981 in addition to other ventures.

(c) That said trade show known as CATEL EXPO—PROGRAMMING SOURCES '81 was the first all programming, conference and exposition in the Cable Television Industry and was formed and produced in order to develop a national and international market place for Cable Television programming of all types and kinds.

(d) For the purposes of said trade show, programming was considered to be anything a system operator sends out over his or her wire including, but not limited to movies, sports and other entertainment organized in a complete network format or offered on a stand-alone basis; news, weather and business information; educational courses, home security, transactional and other interactive programming services.

(e) That said trade show consisted of 80,000 square feet of exhibit space to be filled by 350 booths and it was expected that 5,000 or more persons would appear at said trade show for the purpose of same.

7. (a) Defendant, HBO, is a corporation which is believed to be organized under the laws of the State of New York or under the laws of another State of the United States of America with authority to do business in the State of New York.

(b) Defendant, HBO, has and maintains its main offices at 1271 Avenue of the Americas, New York, New York, and has and

maintains numerous and various offices in its name or in the name of its affiliates throughout the United States of America.

(c) Defendant, HBO, is the most widely available and purchased Pay-TV Satellite Network in America, with seven and one-half million subscribers in the United States.

(d) Defendant, HBO, also does business under the trade name of CINEMAX and has and maintains seven hundred thousand additional subscribers and has become the industry's leading tiered market performer.

(e) That the business of the defendant, HBO, is to purchase film programming and other programs from independent programmers or manufacture its own programs which it sends up through a satellite to a Cable System Operator who are affiliates of HBO throughout the country, who, in turn, send HBO programs to the home of the various subscribers. In addition, HBO provides direct services to subscribers in certain areas of the United States of America including, but not limited to, the cities of New York and Las Vegas.

(f) That the defendant, HBO, has over 3,000 Cable System Operators or affiliates throughout the United States of America.

8. (a) Defendant, SHOWTIME, is a corporation organized under and by virtue of the laws of the State of New York or under and by virtue of the laws of another State of the United States of America with authority to do business in the State of New York.

(b) That defendant, SHOWTIME, has and maintains its main offices at 1633 Broadway, New York, New York, and has and maintains numerous and various offices throughout the continental United States.

(c) Defendant, SHOWTIME, has two and one-half million subscribers in the United States.

(d) That the business of the defendant, SHOWTIME, is to purchase film programming and other programs from independent programmers, or manufacture its own programs, which it sends up through a satellite to Cable System Operators who are affiliates of SHOWTIME throughout the Country, who, in turn, send the SHOWTIME programs to the homes of the various subscribers.

(e) That the defendant, SHOWTIME, has and maintains approximately 1,300 Cable System Operators or affiliates to whom it sells its programs for distribution to the various subscribers or homeowners who subscribe to the SHOWTIME ENTERTAINMENT network.

TRADE AND COMMERCE OF CABLE PROGRAMMING

9. (a) The Cable Television Industry had its beginnings in the middle of this century. Prior to the commencement of any form of Cable Television, a homeowner was only able to obtain the reception available to him from the antenna on top of his house. The initial basic television system consisted merely of a community antenna service offered by a Cable System Operator simply to enhance the television reception in certain areas where reception was extremely poor.

(b) Subsequently and during the 1970s, the defendant, HBO, became the first satellite distributed system wherein and whereby it would purchase programming and sell programming services and place said programming out as a premium service through a satellite to its various Cable System Operators. The defendant, SHOWTIME, additionally created a satellite distributed system wherein and whereby it actually performs the same services as the defendant HBO.

(c) The defendants, HBO and SHOWTIME, have now become the dominant forces in the Cable Pay-Television Industry with many thousands of affiliates and over ten million subscribers throughout the United States of America.

(d) That the defendants, HBO and SHOWTIME, have, over the years, unlawfully monopolized the market for programming to the Cable Television Industry. Said defendants are the most powerful and influential sources through which programming may be sold in the Cable industry, and they, upon information and belief, have offered extremely low and unfair prices for programming to the independent company who attempts to sell programming to them.

(e) That the defendants, HBO and SHOWTIME, are the property of parent companies that own, or have owned, production and programming facilities, thus creating a vertical integration of the Cable Television Industry in order to restrict the cable market outlets for independent producers and distributors of programming and have created a situation where there is a severe restraint imposed upon diversity of information sources or access in violation of the laws heretofore set forth and in violation of the First Amendment of the United States Constitution.

(f) That as the Pay-Television Industry presently stands in connection with the over ten million subscribers of the defendants herein, said defendants have offered a complete "bundle" of services which has resulted in monopolistic conditions in the Wire Community. This is a result of unrestricted ownership by the defendants' parent companies of multiple cable systems, pay programming services and the means for manufacturing programming.

(g) That the defendants, SHOWTIME and HBO, have always conducted themselves in such a manner as to sterilize the independent programmers as an independent industry by reason of the monopolistic control by said defendants of the satellite systems in the Cable Television Industry.

10. (a) That prior to the creation of CATEL EXPO—PROGRAMMING SOURCES '81 by the plaintiff, there has never been an all programming conference and exposition in the Pay-Television or Cable Television Industry.

(b) That the purpose of CATEL EXPO—PROGRAMMING SOURCES '81 was to bring together all suppliers of cable programming—both independent suppliers of stand-alone programs and network services—in one trade show and to create for the Cable Television Industry a truly comprehensive exposition and conference.

(c) That the further purpose of the CATEL EXPO—PROGRAMMING SOURCES '81 was to create a diversity of information sources and access so that Cable System Operators would not be dependent upon the defendants whose vast Satellite Network Services dominate the Pay-TV business in Cable Television.

OFFENSES
COUNT I

11. From a time beginning in the mid-1970's and continuing up to the date of the filing of this Complaint, the defendants, in violation of Sections 1 and 2 of the Sherman Antitrust Act (15 USC Sections 1 and 2) and in violation of the Clayton Act (15 USC Sections 13 and 14) have attempted and conspired to monopolize, have monopolized and are monopolizing the Cable Television Industry by controlling both large programming networks and large cable companies and limiting the diversity of information sources and access to the general public as hereinafter set forth.

12. That the defendants have attempted to conspire and have conspired to restrain trade by reason of the fact that the defendants have taken all necessary steps to sabotage the Cable Television trade show known as "CATEL EXPO—PROGRAMMING SOURCES '81" and have further boycotted said trade show due to the fears of the defendants of stand-alone suppliers uniting and thereafter invading the Cable Industry and destroying the monopoly created by the defendants in the Cable Television Industry.

13. That the defendants issued letters, memorandas and made phone calls to various independent programming and system operators throughout the Cable Television Industry to inform them that they should not appear at the plaintiff's trade show in September, 1981.

14. That an authorized representative of the defendant, SHOWTIME, DAVID BATALSKY, informed a person who he thought was an independent producer of defendant's, SHOWTIME, position regarding CATEL EXPO—PROGRAMMING SOURCES '81 in the following manner on September 14, 1981:

> We as a company will not participate in that show. Not because it is a non-cable show, but because I felt it was a rip-off show and I felt they were opportunists who were not presented—They were going to make money, but I didn't have a chance to make money that's not a partnership, that's a rip-off . . . That's not the only reason. This I can tell you without being libelous. The Showtime's position is very simple. We sell a complete package of programming. We do not sell at the privilege of cherry picking. So that if somebody would see that we have let's say a Willie Nelson special, they couldn't come to us and buy a Willie Nelson special. They have to buy the 24-hour programming day from Showtime on a month basis to get that one special. Okay.

15. That the defendants have informed, upon information and belief, independent programming suppliers and system operators in the Cable Television Industry that the show known as CATEL EXPO—PROGRAMMING SOURCES '81 was a rip-off or scam and was a fraud on the public and that none of the exhibitors would appear at said show and that in essence the operators of said show would run away with the monies received as and for the rental of booths for exhibitors at said show, that CATEL EXPO was undercapitalized and that it was asking for too much money up front from exhibitors.

16. That prior to the sabotage which resulted from the conspiracy to restrain trade by the defendants, the plaintiff had sold

139 booths in said show to 79 companies and was expecting to sell each and every one of the 350 available booths at said show, and further expected to have in excess of 5,000 persons appearing at said show.

17. That prior to the defendants effectuating their conspiracy to sabotage and boycott said trade show, it was anticipated that more than 250 companies would be exhibitors at the involved trade show.

18. That as a result of said sabotage and conspiracy on the part of the defendants only 55 companies were exhibitors at said trade show and less than 200 people appeared at said trade show and only 97 booths were actually occupied at said trade show.

19. That, upon information and belief, the independent suppliers of stand-alone programming and other programming suppliers decided not to appear at said trade show due to the pressure created by the conspiracy conducted by the defendants by reason of the fact that said defendants threatened programming suppliers that the defendants would no longer purchase programs from them even at the normally low prices which has become the standard in the industry due to the monopolistic practices of the defendants.

20. That as a result of the conspiracy of the defendants as hereinbefore set forth to sabotage and boycott the plaintiff's trade show, the defendants have accomplished their means of driving competitors from the market and of not permitting independent suppliers of stand-alone programming to be solidified into a unit which would attempt to challenge the monopoly created by the defendants, whose parent companies have control of both large programming networks and large cable companies to the point that the defendants monopolize the Cable Television Industry and all of its affiliated businesses.

21. That the defendants contacted and informed certain industry consultants and others who were planning to assist

CRIMPERS PROMOTIONS INC. in the development of the conference portion of CATEL EXPO—PROGRAMMING SOURCES '81, that if they did not back out of their plans to support plaintiff's trade show, they would suffer consequences that would destroy their respective businesses.

22. That the defendants have been and continue to be engaged in an illegal conspiracy and restraint of trade in the interstate distribution of Cable Pay—Television Programming to the public in violation of the Sherman Antitrust Act, Section 1, 15 USC, Section 1, which conspiracy has had as its intent and purpose the elimination of competition would have been created by the trade show conducted by the plaintiff. Said conspiracy was entered into for the purpose of restraining and/or monopolizing such trade in the United States of America in the Cable Television Industry and to diminish or prevent independent suppliers of cable programming and the plaintiff from being in a position to properly sell their products and services to the Cable Television Industry. That the defendants have been and continue to attempt to monopolize and to monopolize the sale of programming in the Cable Television Industry in the United States of America. Said conspiracy to restrain trade is a violation per se of Section 1 of the Sherman Antitrust Act and said conspiracy to monopolize, attempts to monopolize or monopolization are violations of Section 2 of the Sherman Antitrust Act.

23. That as a result of the conspiracy as hereinbefore set forth of the defendants to restrain trade and/or the conspiracy to monopolize, attempt to monopolize or monopolize the Cable Television Industry and as a result of the acts of the defendants in furtherance of said conspiracy, the plaintiff's trade show suffered extreme losses and has been eliminated as a viable trade show in the Cable Television Industry.

24. As a result of the continuing illegal conspiracy engaged in by the defendants for the purpose of preventing the plaintiff from selling booths at its trade show, the purpose of which was to

eliminate plaintiff as a creator of competition in the Cable Television Industry, the defendants committed the overt acts hereinbefore set forth in addition to the following:

(a) In entering into secret and illegal tie-in arrangements wherein and whereby the defendants and their parents have unrestricted ownership of multiple systems including the ownership of the cable systems and the control of the programming which has unduly restricted trade and has violated the rights of viewers under the First Amendment of the United States Constitution;

(b) That, as divulged in other comments from persons in the Cable Television Industry, a representative of the defendant, HBO, WINSTON (TONY) H. COX, has prepared or caused to be prepared a "study" of CATEL EXPO and the plaintiff, CRIMPERS PROMOTIONS, INC., which allegedly improperly reveals the plaintiff to be both unethical and illegal in its motives for sponsoring a cable programming trade show, and in the methods by which it is developed and promoted said trade show. In addition, the aforementioned study prepared or caused to be prepared by Mr. Cox, has been given wide distribution privately and secretly by Mr. Cox and/or others employed by the defendant, HBO, to other programming firms supplying the Cable Television Industry and to Cable System Operators and the purpose of these actions was, upon information and belief, to be to discredit the plaintiff and to sabotage the success of CATEL EXPO—PROGRAMMING SOURCES '81;

(c) That a representative of the defendant, HBO, WINSTON (TONY) H. COX, contributed to the public embarrassment of plaintiff's representative, RONALD (DON) MITTMAN, on the exhibit floor of the Texas Cable Television Association Convention in San Antonio, Texas, on February 5, 1981. The aforementioned public embarrassment occurred when Mr. Cox loudly denied the intention of defendant, HBO, ever to attend or exhibit at CATEL EXPO—PROGRAMMING SOURCES '81, making such

denial in the presence of representatives of other potential exhibitors in CATEL EXPO—PROGRAMMING SOURCES '81 causing said potential exhibitors to shun CATEL EXPO—PROGRAMMING SOURCES '81. The denial attributed to Mr. Cox was made by him in spite of the fact that another representative of defendant, HBO, HOWARD BERKAT, at that time in charge of HBO participation in Industry Trade Shows, had on December 13, 1980, made a verbal agreement with Mr. Mittman, in the presence of Mr. Carlos A. Nazario, another representative of the plaintiff, to have HBO take exhibit booths at CATEL EXPO—PROGRAMMING SOURCES '81 and had verbally agreed to allow Mr. Mittman to publicize HBO's intentions of exhibiting at CATEL EXPO—PROGRAMMING SOURCES '81. Said actions on the part of HBO were in furtherance of its desire to sabotage the plaintiff's trade show and to continue to dominate the Cable Television Industry;

(d) That on December 13, 1980, a representative of defendant, HBO, HOWARD BERKAT, did make a verbal agreement to take exhibit booths at CATEL EXPO—PROGRAMMING RESOURCE '81 for the purpose of exhibiting the programming services of said defendant. In addition, for a period of two and one-half months, with the permission of Mr. Berkat, Mr. Mittman, on behalf of the plaintiff, did publicize HBO's intentions of exhibiting at CATEL EXPO—PROGRAMMING RESOURCES '81, and at no time during that period did defendant, HBO, request Mr. Mittman to cease and desist from publicizing HBO's intentions. Further, when Mr. Berkat, in a letter dated February 18, 1981 to Mr. Mittman did finally request that such publicity cease, Mr. Berkat improperly denied ever expressing any intention of having defendant, HBO, exhibit at CATEL EXPO—PROGRAMMING SOURCES '81. Such contradictory behavior on the part of HBO did severely damage the credibility of CATEL EXPO—PROGRAMMING SOURCES '81 with both potential exhibitors and attendees with the intent to sabotage and destroy the plaintiff's trade show;

(e) That in a continuing series of conflicting public statements made by representatives of defendant, HBO, regarding HBO's plans for exhibiting at CATEL EXPO—PROGRAMMING SOURCES '81, the credibility of plaintiff's trade show and that of Mr. Mittman were continually in doubt—thus causing the ultimate failure of CATEL EXPO—PROGRAMMING SOURCES '81 together with the actions of the defendant, SHOWTIME, as hereinbefore set forth;

(f) Defendants, from time to time, collectively refused to deal with the plaintiff and have forced various independent suppliers of programming to the Cable Television Industry via commercial pressure to refuse to deal with the plaintiff at its trade show;

(g) That defendants have refused and failed to pay the fair and reasonable value for programs to independent programming companies who sell programs to the defendants in violation of the rules regarding fair competition;

(h) The defendants conspired and continue to conspire to conceal from the plaintiff the fact that the foregoing overt acts had been committed and are continuing to be committed;

(i) The result of the conspiracy entered into by and between the defendants has been the restraint of trade in interstate commerce in the Cable Television Industry which has lessened and/or eliminated competition in the manufacture, purchase and sale of programming and has resulted in the creation of a monopoly by the defendants in the business of the transmission of cable television to the ultimate subscriber or consumer.

25. The acts of the defendants as alleged herein have caused and are continuing to cause, immediate and irreparable harm and damage to the plaintiff for which there is no adequate remedy at law and restraint by injunction is necessary to afford the plaintiff adequate relief.

COUNT II

26. That paragraphs "1" to "25", both inclusive, are incorporated herein as if the same were set forth and repeated at length.

27. That the defendants control over ten million subscribers in the Cable Television Industry and have, therefore, control over the major portion of said market and have, through their various overt acts heretofore set forth, restrained independent suppliers of programming and the creation of a solid, prosperous block of independent suppliers of cable programming as would have come about through the plaintiff's trade show.

28. That as a result of the defendants acquiring more than ten million subscribers and as a result of the overt acts heretofore set forth, the defendants have a monopoly in violation of Section 2 of the Sherman Antitrust Act on the distribution and sale of programming throughout the United States of America.

29. The attempt to monopolize, conspiracy to monopolize, or the monopolization of the Cable Television Industry as hereinbefore set forth has and will lessen or eliminate competition to the detriment of the public in the United States of America to the extent that the defendants control the entire Pay—Television or Cable Television Industry.

30. Said attempt to monopolize, conspiracy to monopolize, or the monopolization of the Cable Television Industry has and will cause plaintiff to cease doing business because of their inability to obtain exhibitors and attendees at their programming trade show.

31. The acts of the defendants as alleged herein have caused, and are continuing to cause, immediate and irreparable harm and damage to the plaintiff for which there is no adequate remedy at law and restraint by injunction is necessary to afford the plaintiff adequate relief.

COUNT III

32. Plaintiff incorporates by reference all the allegations of paragraphs 1-31 of this Complaint.

33. From a time beginning in the mid-1970's and continuing up to the date of this Complaint, the defendants, in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act have contracted, combined and conspired with others in restraint of trade and commerce:

(a) To foreclose actual and potential competitors from the markets of Cable Television and to this end has engaged in the practices hereinbefore set forth;

(b) To engage in the practice of an illegal tie-in and the bundling of programming with multiple Cable System Operators owned by defendant's parent companies to create a vertical integration in restraint of trade. The practices of the defendants as hereinbefore set forth and the contracts, agreements and understandings entered into in implementation thereof, have restrained interstate and foreign trade and commerce to a substantial amount in the manufacture, sale and trading of programming and Cable Television services.

34. The acts of the defendants as alleged herein have caused, and are continuing to cause, immediate and irreparable harm and damage to the plaintiff for which there is no adequate remedy at law and restraint by injunction is necessary to afford the plaintiff adequate relief.

COUNT IV

35. Plaintiff incorporates by reference each of the allegations set forth in paragraphs 1-34 of this Complaint.

36. The acts and practices hereinbefore set forth were and are reasonably likely to injure plaintiff and were and are being carried out by defendants with the intent of injuring plaintiff and have constituted and constitute actual unfair competition and

unlawful interference with plaintiff's advantageous business and commercial relations.

37. Defendants' acts and practices in "bundling" has adversely affected competition and constitutes unfair competition in that it is virtually impossible to sell programming "on the merits" or for the plaintiff to conduct its said trade show.

38. That the defendants' practices have severely restricted the supply of cable programming to the ultimate consumer or subscriber and have restrained the business opportunities of independent persons or companies offering programming and, therefore, unlawfully interfered with plaintiff's position in the Cable Television Industry.

39. The acts of the defendants as alleged herein have caused, and are continuing to cause, immediate and irreparable harm and damage to the plaintiff for which there is no adequate remedy at law and restraint by injunction is necessary to afford the plaintiff adequate relief.

COUNT V

40. Plaintiff incorporates by reference each of the allegations set forth in paragraphs 1-39 of this Complaint.

41. That the defendants knew that the exhibitors whom they lured and enticed away from the plaintiff were contractually bound to plaintiff to appear at the involved trade show.

42. That said defendants' conduct constituted an unlawful inducement of said persons to wilfully and maliciously breach each and every contract they entered into with the plaintiff and such conduct was performed with the intent and purpose of destroying plaintiff's business and with the intent to cause a breach of said contracts.

43. That because of the acts of the defendants as herein alleged, many of the exhibitors who had signed contracts to appear at the plaintiff's trade show breached their contracts and refused to appear at said show.

44. That as a result of the actions of the defendants as alleged herein, the plaintiff was damaged as hereinafter set forth.

COUNT VI

45. Plaintiff incorporates by reference each of the allegations set forth in paragraphs 1-44 of this Complaint.

46. Defendants wilfully engaged in a planned scheme to lure and entice away customers of the plaintiff whom said defendants knew or should have known were under contract to said plaintiff at the time of said unlawful attempts to lure and entice away said customers, the intent and purpose of said scheme being to destroy plaintiff's business, and by such conduct said defendants maliciously interfered with plaintiff's contractual relationships with its said customers as hereinbefore set forth.

47. The acts of the defendants as alleged herein have caused, and are continuing to cause, immediate and irreparable harm and damage to the plaintiff for which there is no adequate remedy at law and restraint by injunction is necessary to afford the plaintiff adequate relief.

DAMAGE TO PLAINTIFF

48. As a direct result of defendant's unlawful activities, plaintiff has suffered damages as follows:

(a) In the Cable Television Programming Industry, defendants' policies and use of its monopolistic economic and technological strength to foreclose the trade show market to the plaintiff and defendants' unfair competition has deprived the plaintiff of revenues aggregating many millions of dollars and plaintiff has suffered a loss of profits of ONE MILLION SIX HUNDRED FORTY-FIVE THOUSAND AND NO/100 ($1,645,000.00) DOLLARS in said market;

(b) Retarding of economic and technological growth of plaintiff. The loss of revenues and profits from the aforementioned markets has seriously retarded and impaired both the financial

and technological development of plaintiff in that it has deprived plaintiff of the resources required for the successful development and marketing of trade shows and other businesses and has thereby caused plaintiff a loss of profits in the amount of NINETEEN MILLION FIVE HUNDRED TWO THOUSAND FOUR HUNDRED SIXTY AND NO/100 ($19,502,460.00) DOLLARS.

Defendants threaten to continue and will continue the offenses herein alleged unless the relief hereinafter prayed for is granted.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays:

1. That the Court order, adjudge and decree that defendant has, in violation of Sections 1 and 2 of the Sherman Antitrust Act and Sections 2 and 3 of the Clayton Antitrust Act, monopolized, attempted to monopolize, and contracted, combined and conspired to monopolize and restrain interstate and foreign commerce and trade in the Cable Television Industry in the manufacture, purchase and sale of programming for the Cable Television Industry and in the general monopolization of said industry.

2. That the Court issue an injunction permanently enjoining and restraining defendants, their subsidiaries, affiliates, officers, directors, agents, employees, successors, assigns, and all persons acting under, through or for defendants from, in any manner, directly or indirectly, engaging in any practices or conduct herein complained of or otherwise found to contribute to the violations of the Antitrust Laws of the United States.

3. That the Court order and direct the defendants to divest themselves from all activities in the programming portion of the Cable Television Industry including the interference with the trade show conducted by the plaintiff; that said divestiture be upon such terms and conditions as will guarantee said markets to be free and competitive.

4. That until such divestiture is fully effective, the Court preliminarily order and direct the defendants (a) not to become involved in any further interference whatsoever with the trade shows being conducted by the plaintiff or with contracts between the plaintiff and its customers and to divest themselves of all interests in any companies manufacturing or distributing programs for the Cable Television Industry and that the Court further enjoin and restrain defendants (b) from selling any combination of programs and Cable Television services at any price below the total of the unit prices involved in the sale.

5. That the Court award Judgment to plaintiff in the amount of FIFTY-EIGHT MILLION FIVE HUNDRED SEVEN THOUSAND THREE HUNDRED EIGHTY AND NO/100 ($58,507,380.00) DOLLARS constituting treble the damages of NINETEEN MILLION FIVE HUNDRED TWO THOUSAND FOUR HUNDRED SIXTY AND NO/100 ($19,502,460.00) DOLLARS sustained by plaintiff plus such additional damages trebled as plaintiff may hereafter sustain as a result of the continuing unlawful conduct of the defendants in violating the Sherman and Clayton Antitrust Acts, plus interest.

6. That the Court order, adjudge and decree that the acts and practices herein complained of in Counts I to VI constitute unfair competition and unlawful interference with plaintiff's advantageous business and contractual relations and award Judgment to plaintiff in the amount of ONE MILLION SIX HUNDRED FORTY-FIVE THOUSAND AND NO/100 ($1,645,000.00) DOLLARS constituting the amount of damages and loss of profits suffered by plaintiff to the date of the filing of this Complaint, plus such additional damages or losses of profits as plaintiff may hereafter sustain as a result of defendants' continuing unfair competition and unlawful interference with plaintiff's advantageous business and contractual relations in the trade show market, together with Judgment to plaintiff of such additional amount as to the Court may seem just and proper for exemplary and punitive damages arising out of the said unfair competition and unlawful interference plus interest.

7. That the Court direct defendants to pay plaintiff's costs of this action, including reasonable attorney's fees.

8. That the Court order such other, further and different relief as to the Court may seem just and proper and that the Court retain jurisdiction thereof until all the conditions herein complained of have been corrected and free and competitive conditions have been established to the satisfaction of this Court.

.....

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JURY DEMAND

Plaintiff demands a Jury Trial.

.....

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No. 83-1728

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ALEXANDER L. STEVAS

In The

Supreme Court of the United States

October Term, 1983

HOME BOX OFFICE, INC. and SHOWTIME ENTERTAINMENT CORPORATION,

Petitioners,

vs.

CRIMPERS PROMOTIONS INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does the *Associated General* decision prevent the respondent from having standing to bring an antitrust suit in the case at bar wherein the respondent, which was organized to produce, manage and operate a cable television trade show in order to provide a forum for independent producers and suppliers of Cable Television Programming, brought an antitrust suit against the petitioners by reason of the fact that the petitioners conspired together to boycott the respondent's trade show directly and used coercive tactics to force their suppliers and competitors to similarly boycott said show which resulted in direct harm being sustained by the respondent?[1]

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1. The respondent is dissatisfied with the question presented by the petitioners and offers the within question as the real question at issue in the case at bar.

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HOME BOX OFFICE, INC. and SHOWTIME ENTERTAINMENT CORPORATION,

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vs.

CRIMPERS PROMOTIONS INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Crimpers Promotions Inc. ("Crimpers"), the respondent in the above mentioned proceeding, respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 12, 1983 brought by the petitioners, Home Box Office, Inc. ("HBO") and Showtime Entertainment Corporation ("Showtime"). The respondent is satisfied with the presentation by the petitioners of the list of parties, the citations to the opinions and judgments delivered in the courts below, the statement of the grounds on which the jurisdiction of this Court is invoked and the citations and quotations of the statutory provisions involved.

STATEMENT OF THE CASE

The statement of the case presented by the petitioners unfairly and improperly fails to analyze the relationship which Crimpers had to HBO and Showtime and the effect that Crimpers had upon the decision of HBO and Showtime to boycott and sabotage CATEL. Instead, HBO and Showtime merely attempt to analyze the levels in the alleged distribution chains of Cable Television Programming in order to convince this Court that Crimpers is not a participant in any level of the alleged distribution chain which allegedly automatically excludes Crimpers from having standing to bring the within lawsuit. It is for these reasons that a counterstatment of the case must be submitted by Crimpers so that this Court will have the appropriate statement to apply in making a determination that the petition of HBO and Showtime must be denied in all respects.

Crimpers is a New York corporation organized in 1980 which was formed for the initial purpose of producing, managing and operating a cable television trade show known as CATEL EXPO - PROGRAMMING SOURCES '81 ("CATEL") which was held in the Las Vegas Hilton Convention Center from September 25-27, 1981 in addition to other ventures. The trade show was to be the first all-programming, conference and exposition in the Cable Television Industry and was formed and produced in order to develop a national and international market place for Cable Television Programming of all types and kinds (App. D at 3d).[2] The trade show was to provide a forum in which independent producers and suppliers of Cable Television Programming could meet and transact business with prospective purchasers of such programming, such as cable television networks. The term "Programming" as conceived in connection with said show is defined in paragraph 6(d) of the complaint (App. D at 3d) and essentially consists of anything the Cable System Operator can sell for a profit to the community he serves. There was no other show ever conceived prior to the conception of CATEL EXPO which had as its sole purpose an international market place for programming of all types.

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2. All references to the Appendix in this brief are references to the Appendix presented by the petitioners.

HBO and Showtime are two of the leading companies in the Cable Television Industry. Both HBO and Showtime purchased programming from independent producers and suppliers and packaged said programming into a complete network format for sale to Cable System Operators. The Cable Operators, in turn, transmit the HBO and Showtime network programming to their home television subscribers. In fact, HBO and Showtime are the dominant forces in the Cable Pay-Television Industry with thousands of affiliate networks and over ten million subscribers throughout the United States (App. D at 4d-5d).

Crimpers had rented 80,000 square feet of exhibit space to be filled by 350 booths in the Las Vegas Hilton Convention Center and expected that 5,000 or more persons would attend.

HBO and Showtime immediately got together in a concerted effort to sabotage and boycott CATEL. The sole reason for said boycott and sabotage was that both HBO and Showtime were desirous of preventing a show from taking place that would bring the independent programmer and buyer together so that they would not have to go to the central sources (HBO and Showtime). In other words, HBO and Showtime boycotted and attempted to ruin the trade show produced by Crimpers for fear that its success would provide a forum in which independent buyers and sellers of cable programming could transact business face-to-face which would result in reducing or eliminating the economic power of HBO and Showtime in the Cable Television Industry. HBO and Showtime recognized that at the show produced by Crimpers, the Cable System Operator would be able to get its own programming without having to go through Showtime or HBO which required that said operator actually purchase a full network of programs in order to obtain a specific item. In this manner, HBO and Showtime would no longer be in a position to act as middlemen in the Cable Industry, purchasing large amounts of programming from independent producers at artificially low prices, arranging the program into a network format, and then reselling it as a package at artifically high prices to cable networks for transmission to subscribers. In fact, Crimpers alleges in its complaint that independent buyers and sellers of programming are kept from trading on a "stand-alone" basis because of the power of HBO and Showtime as middlemen (App. D at 5d, 9d,

13d). Crimpers was, therefore, acting as an agent or broker of the producer of a small film by giving them a forum to sell their films to the Cable System Operator and, therefore, skipping over the monopolistic middlemen, HBO and Showtime.

HBO and Showtime immediately began a campaign to sabotage the show and did the following things to accomplish their boycott:

1. HBO and Showtime, after expressing their initial interest in CATEL, decided to withdraw from participation.

2. HBO and Showtime acted together and agreed that they would inform all small producers that if they exhibit or attend CATEL, Showtime and HBO would not buy their programming even at the normally low prices which had become the standard in the industry due to the monopolistic practices of HBO and Showtime (App. D at 9d).

3. Each defendant issued letters, memoranda and made phone calls to various independent programming and system operators throughout the Cable Television Industry to inform them that they should not appear at CATEL (App. D at 8d).

4. Showtime and HBO jointly and separately called the show a rip-off and a scam and a fraud and informed people that Crimpers would run away with the monies received as and for the rental of booths from exhibitors at said show, and additionally informed all persons with whom they came in contact that the show was undercapitalized and it was asking too much money up front from exhibitors (App. D at 8d).

5. A gentleman named Robert Schultz, of Video Probe Index, indicated that he would not help organize the conference portion of CATEL after he had verbally agreed to do so by reason of the fact that he stated that intense pressure was placed upon him by certain power people in the Cable Television Trade Associations which included HBO and Showtime.

6. HBO and Showtime contacted and informed industry consultants and others who were planning to assist Crimpers in

the development of its show that if they did not back out of their plans to support the show, they would suffer consequences that would destroy their respective businesses (App. D at 9d-10d).

HBO and Showtime have reduced competition in the markets for the sale and purchase of programming for cable television and have prevented independent producers and suppliers from transacting business with potential purchasers on a stand-alone basis at trade shows like the one organized by Crimpers. Prior to the conspiracy and boycott created by HBO and Showtime, Crimpers anticipated that more than 250 companies would participate in its trade show. As a result of the actions of HBO and Showtime, less than 200 people appeared at said trade show and only 55 companies were exhibitors at said trade show, occupying fewer than 100 of the available 350 booths. Crimpers was unable to obtain sufficient exhibitors and attendees for its trade show, continues to be unable to do so and has been forced to cease business solely and only as a result of the acts of HBO and Showtime.

Crimpers was the actual target and directly injured by the activities of HBO and Showtime and, therefore, brought the within lawsuit. Thereafter, HBO and Showtime moved to dismiss Crimpers' Sherman Act Section 1 and 2 claims on the ground that Crimpers lacked antitrust standing to sue for treble damages pursuant to Clayton Act Section 4. In addition, the defendant moved to dismiss the various state law claims included in the complaint. Judge Sand in the District Court denied the motion except for the tying claim and some of the state law claims. The District Court then certified its decision for interlocutory appeal and the Court of Appeals granted leave to appeal, which appeal was subsequently denied.

SUMMARY OF ARGUMENT

The writ requested herein should be denied. In the first place, the decision below does not conflict directly with this Court's ruling in *Associated General Contractors, Inc. v. California State Counsel of Carpenters*, 103 S. Ct. 897 (1983). The lower court quite properly recognized that "the *Associated General* opinion . . . simply cited the 'target area' test as one of many,

103 S. Ct. at 907 n. 33" and "advised the Courts to abstain from black letter rules and to analyze the facts in each case." (*See* App. A at 7a.) The *Associated General* opinion recognized that issues of "standing" are extremely fact-sensitive and set up various criteria and tests which must be considered in determining whether or not a particular plaintiff has standing to bring an antitrust claim. As will be developed later in this brief, Crimpers meets every one of the criteria to affirmatively establish that it has standing to bring its claim herein as was recognized by the lower court. In this regard, Crimpers is not in the same position as the unions were in the *Associated General* case and it is, therefore, evident that Crimpers has standing to assert its antitrust claims.

In the second place, the case at bar does not conflict with and is distinguishable from the Seventh Circuit decision in *Bichan v. Chemetron Corp.*, 681 F. 2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983) or the decision rendered in this Court vacating a Ninth Circuit decision granting standing in the case of *Ostrofe v. H.S. Crocker Company, Inc.*, 670 F. 2d 1378 (1982). The courts in the *Bichan* and *Ostrofe* cases were dealing simply with a different set of facts than is applicable in the case at bar and cases involved antitrust standing are extremely fact-sensitive. The lower court did not create any conflicts in determining that standing exists herein as is alleged by HBO and Showtime in their brief, but instead applied the criteria and tests developed by the *Associated General* decision in determining that standing exists in the case at bar.

Crimpers was the victim of the conspiracy of HBO and Showtime to boycott CATEL directly and to use coercive tactics to force their suppliers and competitors to similarly boycott said show. In the within case, the conspiracy of HBO and Showtime was directed at Crimpers and no other person. HBO and Showtime effectively took direct aim at Crimpers and its trade show and, therefore, was the clearly identifiable target against whom HBO and Showtime aimed their conspiracy. It is the argument of Crimpers, as was adopted by the lower court, that Crimpers was a target which was sufficiently connected to the unlawful behavior of HBO and Showtime so as to have standing under Section 4 of the Clayton Act.

In fact, the injuries to Crimpers were clearly foreseeable by HBO and Showtime when they undertook their conspiracy and boycott.

Crimpers has alleged and the lower courts have properly agreed that a plaintiff need not be a direct competitor in the market in which HBO and Showtime operate and the fact that Crimpers does not directly compete with HBO and Showtime in the purchase and sale of cable programming is, therefore, not dispositive. Crimpers was no mere supplier or customer or employee only tangentially related to the goal of the conspiracy of HBO and Showtime. In the *Associated General* case, the Union was only tangentially related to the goal of the conspiracy and was far removed from the nature of the conspiracy. In the case at bar, Crimpers was the entity against whom the conspiracy took direct aim and was the direct victim of said conspiracy. The *Bichan* and *Ostrofe* cases deal with a former employee who refused to participate in a boycott or a conspiracy and was thereby forced to resign as a result of his refusal. There are no facts in the Crimpers case which are analogous to the fact patterns existing in either *Bichan* or *Ostrofe*.

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S *ASSOCIATED GENERAL* CASE IS NOT APPLICABLE TO THE CASE AT BAR AND THE CRITERIA ESTABLISHED THEREIN FOR ANTITRUST CASES ARE SATISFIED IN THE CASE AT BAR.

HBO and Showtime allege that the decision in the court below conflicts with the *Associated General* ruling. Crimpers has always asserted that there is no such conflict whatsoever and has recognized that *Associated General* merely created a list of criteria to be utilized in determining whether or not standing actually exists.

In *Associated General*, the plaintiffs were construction-trade labor unions (hereinafter referred to as the "Union") which sued a contractor's association composed of various building and construction contractors. The Union represented more than 50,000 individuals employed by the defendants in the carpentry, drywall, pile driving and related industries throughout the State of California. The Union alleged that the defendants had conspired to coerce General Contractors to use non-union subcontractors and also had conspired to coerce real estate owners to use non-union contractors and subcontractors. The question before the Court in the *Associated General* case was simply whether or not the Union was a proper party to bring an antitrust action. It is true that standing was denied in the *Associated General* case, but said denial supports the argument that the issue of "standing" in antitrust cases is an extremely "fact-sensitive" issue. In fact, the Court in the *Associated General* case recognized the fact that the issue of "standing" is extremely fact-sensitive when said Court held that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id.* at 908.

More important is the fact that the *Associated General* case was a class action on behalf of numerous affiliated local unions and district councils.

The Court in the *Associated General* case even went so far as to recite the observation made by the District Court in said case, that "the Complaint alleged 'a rather vague, general conspiracy,' and that the allegations 'appeared typical of disputes a Union might have with an employer,' which in normal course are resolved by grievance and arbitration or by the NLRB." *Id.* at 901. The Court in *Associated General* was involved with a unique situation where a union was a plaintiff and the Court relied heavily on that particular aspect of the case in denying "standing." The Union was an incidental or a collateral victim of alleged anti-competitive activities directed elsewhere. In the case at bar, Crimpers alleges that the anti-competitive activity was directed at Crimpers. The means to effectuate it is the pressure on the third parties, *i.e.*, the suppliers of programming and Cable Systems Operators. This Court stated in *Associated General* that the complaint in said case did not describe an antitrust violation as does the complaint in the case at bar. In fact, this Court distinguished the *Associated General* case from the case at bar when it stated that no antitrust claims were asserted in the *Associated General* case in the following manner:

> "At common law — as well as in the early days of administration of the Federal Antitrust Laws — the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade. Federal policy has since developed not only a broad labor exemption from the antitrust laws but also a separate body of labor laws specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, supra, 429 U.S. at 487-488. In this case, particularly in light of the long standing collective bargaining

> relationship between the parties, the union's labor-market interests seem to predominate and the *Brunswick* test is not satisfied." *Id.* at 909-910.

More importantly, in the *Associated General* case, there were various links contained in the chain of causation between the Union's injury and the alleged restraint in that the Union claimed that the defendants applied coercion against landowners and other contracting parties in order to cause them to divert business from certain union contractors to non-union contractors. *Id.* at 910. In the case at bar, there is a much greater degree of directness, in that it was the intention of HBO and Showtime to cause injury to Crimpers so that sellers of programming on a stand-alone basis would not be able to meet at the trade show promoted by Crimpers. This Court noted in *Associated General* that the damages claimed by the Union in said case were highly speculative in the following manner:

> "Partly because it is indirect, and partly because the alleged effects on the union may have been produced by independent factors, the Union's damages claim is highly speculative. There is, for example, no allegation that any collective bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members had declined, and no allegation that the union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. . . . Other than the alleged injuries flowing from breaches of the collective bargaining agreements — injuries that would be remediable under other laws — nothing but speculation informs the union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, it is appropriate for

> Section 4 purposes 'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.' " *Id.* at 911.

Conversely, in the case at bar, the damages sustained by Crimpers are not speculative. Crimpers specifically alleges that it was damaged in that only a handful of exhibitors appeared at its trade show when it had originally sold a great portion of its exhibit booths. Crimpers alleges that it was effectively destroyed as a result of the conspiracy and boycott created by HBO and Showtime and that its revenues were substantially decreased as a result thereof and that there is a much greater degree of definiteness in the damages sustained by Crimpers than that which were sustained by the unions in the *Associated General* case.

This Court held as follows with respect to damages in *Associated General*:

> "In this case, if the Union's Complaint asserts a claim for damages under Section 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union contractors, and then to what extent the subcontractors absorbed the damage to their businessses or passed it on to employees by reducing the work force or cutting hours or wages. In turn, it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues." *Id.* at 912.

In addition, this Court in the *Associated General* case held that the "Union's allegations of consequential harm resulting from a violation of the antitrust laws . . . are insufficient as a matter of law" and "other relevant factors — the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged

injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy — weigh heavily against judicial enforcement of the Union's antitrust claim." *Id.* at 913.

The lower court in the case at bar, however, recognized that the damage claim of Crimpers is not speculative at all when the lower court stated that the expenses of Crimpers "in preparing CATEL are easily determinable, and its expected profits from this and future shows should be provable under the liberal principles long recognized in antitrust cases." (*See* App. A at 14a.)

A review of the specific factors and criteria enunciated by this Court in *Associated General* as applied to the case at bar will reveal that the court below did not commit any error whatsoever in deciding that Crimpers had "standing" to assert its antitrust claims and, therefore, the decision below does not conflict with this Court's *Associated General* ruling. Crimpers' complaint does stand the test against the factors enunciated by this Court in *Associated General* which are determinative of the issue of "standing."

A. Crimpers' injury was inextricably interwined with the injury HBO and Showtime sought to inflict on the programming market.

One of the first factors enunciated in the *Associated General* case was that the victim of the antitrust violations had to be injured by the defendants' conspiracy to restrain competition in a particularly relevant market.

In this regard, it is repectfully submitted that the Court is to be guided by this Court's case of *Blue Shield of Virginia, et al. v. McCready*, 457 U.S. 465, 102 S. Ct. 2540 (1982). The *McCready* case is strikingly similar to the case at bar. In the *McCready* case, the plaintiff brought suit under the antitrust laws alleging that Blue Shield and the State Psychiatric Society had engaged in an unlawful conspiracy to exclude psychologists from receiving compensation under Blue Shield's Health Benefits Plan. Under its Plan, Blue Shield reimbursed subscribers for part of the cost of outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield only reimbursed

subscribers for treatment by psychiatrists and not for services provided by psychologists unless treatments were under the supervision of a physician. The plaintiff in the *McCready* case, like the plaintiff in the case at bar, was alleged to be a person outside the market in which the defendants operated. It is well to note that in the within case, HBO and Showtime were involved in the trade show portions of the Cable Television Industry and Crimpers was also involved in the sale of programming in said industry which consisted of one of its other ventures which it alleged to exist in the complaint herein (App. D at 3d, 17d-18d). However, both McCready and Crimpers were the entities against whom the defendants in each case took aim. In fact, as was noted in *McCready*, "the injury McCready suffered was inextricably intertwined with the injury the conspirators sought to inflict on the psychologist and the psychotherapy market." *Id.* at 2555 in Supreme Court Reporter. Similarly, in the *Crimpers* case, the injury Crimpers suffered was so firmly connected with the injury HBO and Showtime sought to inflict on the programming market that Crimpers is firmly associated in the market to the extent that antitrust standing should be permitted.

Judge Sand in writing for the District Court in the case at bar recognized that "at a minimum, it now seems clear that, as a rule, a plaintiff need not be a direct competitor in the market in which the defendants operate . . ." (App. B at 11b). In analyzing the decision of Mr. Justice Stevens in the *Associated General* case, Judge Friendly, in writing for the Court of Appeals in the case at bar, in discussing the factor of relevant market, held as follows:

> ". . . Justice Stevens relied on his discussion of the legislative history to support the conclusion that 'the Sherman Act was enacted to assure customers the benefit of price competition,' id., and went on to state that 'our prior cases,' including *McCready* 'have emphasized the central interest in protecting the economic freedom of participants in the relevant market,' id. at 909 (footnote omitted). Whereas *McCready* was a direct victim of defendants' conspiracy to restrain competition by psychologists with psychiatrists, the

> union's harm resulted from defendants' efforts to thwart its objective of excluding non-union labor and this was a 'labor-market' rather than an antitrust injury. Here, Crimpers claims to be a victim of HBO's and Showtime's conspiracy to prevent direct dealing between producers and television stations by boycotting CATEL." *See* App. A at 12a-13a.

Judge Sand, therefore, properly held that "the fact that Crimpers does not directly compete with the defendants in the purchase and sale of Cable Programming is, therefore, not dispositive" since "McCready herself did not compete with the psychiatrist alleged to have conspired with Blue Cross to restrain trade in the psychotherapy market." (App. B at 11b). HBO and Showtime would like this Court to believe that the destruction of CATEL was only a means by which HBO and Showtime sought to restrain trade. However, in the *McCready* case, the refusal to reimburse subscribers for psychology services was also nothing more than a mere means to further the defendants' goal of reducing competition in the market for psychotherapy services.

It is, therefore, evident that Judge Friendly was correct in his final analysis of the case at bar when he held as follows:

> "In sum, despite the able presentation by defendants' counsel, we are unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under Section 4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants. The contrary view would run counter not only to the two most recent decisions of the Supreme Court, but to elementary common sense. Indeed, if we should free ourselves from the miasma of adjectives that has accumulated around the words of Section 4, this case would seem to be a paradigm of standing" (App. A at 14a-15a).

Other cases which similarly extend the relevant market rule to cases similar to the case at bar are *Aurora Enterprises, Inc. v. National Broadcasting Company Inc., et al.*, 688 F.2d 689 (9th Cir. 1982) and the Second Circuit case of *Western Geophysical Co. v. Bolt Associates, Inc.*, 584 F.2d 1164, 1165 (1978).

There is no doubt but that Crimpers is an entity in the area of the economy threatened by the anti-competitive conduct of HBO and Showtime and that Crimpers, therefore, fits within the test enunciated by the Second Circuit in the case of *Litton Systems, Inc. v. American Telephone and Telegraph Co.*, 700 F.2d 785 (1983).

It is, therefore, evident that Crimpers satisfies the *Associated General* criterion that the plaintiff be a participant in the relevant market.

B. Crimpers would clearly benefit by enhanced competition in the target market.

A second factor which was enunciated in the *Associated General* case was whether or not the interests of the plaintiff would be served or disserved by enhanced competition in the market. Certainly, in the case at bar, Crimpers would clearly benefit by enhanced competition in the target market. The increased competition in the target market would aid Crimpers by reason of the fact that Crimpers had full intention of conducting its all programming conference and exposition in the Cable Television Industry for many years to come and it had further intentions of being involved in other businesses which would have been directly related to its show. Certainly, Crimpers would have benefited by the enhancement of the ability of independent programmers to make more money. If competition was enhanced in the programming market. HBO and Showtime would have been required to pay larger sums for programming instead of the low prices they currently pay. The payment of larger sums as and for programming by the two major purchasers of programming would have resulted in the programming community becoming a richer, more viable community which would have been able to spend larger sums of money at CATEL, both in its initial year and in the years to come. However, said benefits could not be derived by Crimpers due to the actions of HBO and Showtime.

However, as set forth so vividly by the Supreme Court, the goal of the Union in the *Associated General* case is essentially to increase the earnings and improve the working conditions of its membership and the Court noted, at page 909 of its decision, that said goal may not be necessarily served and, in fact, may actually be harmed if competition is uninhibited.

It was the goal of Crimpers to enhance competition in the programming market by conducting a trade show for the benefit of persons who were selling programming on a stand-alone basis and it is, therefore, respectfully submitted that Crimpers would have clearly benefited by the enhanced competition resulting therefrom. It is, therefore, evident that in the case at bar the second factor enunciated in the *Associated General* case was fully satisfied in order to support the lower court's determination that "standing" exists herein.

C. Crimpers' injuries are directly related to the antitrust violations of HBO and Showtime.

A third factor considered by the *Associated General* Court was the directness or indirectness of the asserted injury. In the *Associated General* case, the Court noted on page 910 that "the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts contain several somewhat vaguely defined links." In said case, the plaintiff alleges that the defendants applied coercion against certain land owners and other contracting parties in order to cause them to divert business from certain union contractors to non-union contractors and the Union's complaint alleged only unspecified injuries in its "business activities." *Id.* at 910. The Court noted in *Associated General* that "any such injuries were only an indirect result of whatever harm may have been suffered by 'certain' construction contractors and subcontractors." *Id.* at 910. The *Associated General* case held that it was the construction contractors or subcontractors who had the right to maintain their own treble damage actions against the defendants.

In the within case, HBO and Showtime assert that Crimpers' damages are derivative in nature and only indirectly related to the alleged violation. However, as noted by Judge Sand, Crimpers'

injuries are "far more direct and easier to ascertain then those incurred by any one of defendants' direct competitors." (App. B at 11b). Crimpers has alleged that solely as a result of the actions of Showtime and HBO, certain specific companies which had intended to attend Crimpers' trade show decided instead to boycott it. Judge Sand quite properly noted that "By contrast, one of defendants' direct competitors in the purchase of cable programming (who, according to defendants, would have standing to sue) would have a more difficult time quantifying the harm it incurred on account of an overall reduction in competition." (App. B at 11b-12b). In fact, Judge Sand went on to further state that "it is Crimpers' damages, not those of defendants' direct competitors, that are direct and quantifiable in this case." (App. B at 12b).

Judge Friendly in the decision of the Court of Appeals in the case at bar analyzed both the *McCready* and *Associated General* rationale with respect to the remoteness and indirectness of the claimed injuries.

Judge Friendly analyzed the *McCready* test of remoteness as adopted by Mr. Justice Brennan of the within Court in the following manner:

> "Justice Brennan then turned to the second limitation, which he characterized as the 'conceptually more difficult question' whether the injuries were 'too remote' from the antitrust violation to afford standing. 102 S. Ct. at 2547. After analogizing the concept of remoteness to the 'elusive' notion of proximate cause, he stated that Courts should 'look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under Section 4.' Id. at 2548." (App. A at 8a).

Judge Friendly then held that Crimpers easily complied with the two tests established by Mr. Justice Brennan in the following manner:

> "Crimpers easily surmounts the first hurdle. The alleged violations were defendants' conspiring to interpose barriers against direct dealings between the producers and the stations and attempting to monopolize the business of furnishing programs. Crimpers got in the way and defendants allegedly made it suffer for trying to do so. The second test is likewise satisfied. Defendants concede that their alleged activities were within the concern of Congress insofar as they adversely affected the producers or the stations. We see no reason why Congress, had it considered the matter, would not have been equally concerned with protecting a company like Crimpers which undertook to create a business that would have mitigated the precise injury, the limiting of dealings between producers and television stations to those conducted through HBO and Showtime, against which Congress meant to protect. Crimpers was not just a 'supplier' of a competitor, to whom standing is generally denied, see *2 Arceeda & Turner*, supra, Section 340 (e) at 217. It was endeavoring to forge a link in a chain of the sale of programming, to wit, direct contact between program producers and cable television stations, that would compete with defendants in their role as middlemen. The injury to Crimpers was not a 'remote' consequence of defendants' acts as would have been the case, for example, if the low prices allegedly paid by them had put a producer out of business and a supplier of the producer sued under Section 4. In such cases the injury to the supplier is simply a consequence of the injury to the producer; Crimpers' case is more like (although stronger than) a boycott of a supplier intended to further the conspirators' restraint of trade and stifling of competition." (App. A at 9a).

Judge Friendly also considered the factor of the indirectness or remoteness of Crimpers' injuries when measured against the same factor applied by this Court in *Associated General*. Although Judge Friendly recognized that direct dealing between producers and television stations would not necessarily take the form of patronizing Crimpers' trade show, Judge Friendly indicated that said issue would be a question of evidence and the amount of damages and is not a basis for dismissal of the complaint herein (App. at 13a).

There is no doubt but that Crimpers suffered the direct impact of the boycott of its show conducted by HBO and Showtime. Judge Friendly recognized this fact when he held that Crimpers "is not a 'remote' party but was the immediate object of defendants' boycott." (App. A at 13a).

It is, therefore, evident that Crimpers does satisfy the additional factor enunciated by *Associated General*, which is that the injuries suffered by Crimpers were directly related to the antitrust violations of HBO and Showtime.

D. Crimpers' damages are not speculative in nature.

A fourth factor considered by this Court in *Associated General* was the fact that the injuries sustained by the Union were speculative in nature. This Court stated on page 911 of its opinion in *Associated General* as to why said damages were extremely speculative as heretofore cited in the introductory portion of this point of this brief.

Both Judge Sand and Judge Friendly recognized that the damages sustained by Crimpers are easily ascertainable. (*See* App. B at 12b and App. A at 13a-14a).

Judge Friendly held that Crimpers was the immediate object of the boycott of HBO and Showtime. In fact, Judge Friendly held that the "producers and stations would be hard put to establish just what damage they had suffered from inability to participate in Crimpers' show" and that the damage claim of Crimpers is not speculative by reason of the fact that "its expenses in preparing CATEL are easily determinable, and its expected

profits from this and future shows should be provable under the liberal principles long recognized in antitrust cases." (App. A at 13a-14a). In fact, Judge Friendly referred the parties to the cases of *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S. Ct. 400, 405, 71 L. Ed. 684 (1927); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946); and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24, 89 S. Ct. 1562, 1576-77, 23 L. Ed. 2d 129 (1969), in support of the fact that the profits earned by Crimpers from CATEL and future shows could be provable under the liberal principles long recognized in antitrust cases.

It is, therefore, evident that the damages sustained by Crimpers were not speculative as was in the case in the *Associated General* case.

E. Crimpers' claims do not present a risk of multiple recovery.

A fifth factor set forth by the Supreme Court in *Associated General* was the fact that the courts are desirous of avoiding duplicate recoveries on the one hand or the danger of complex apportionment of damages on the other. There is no question in the within case that there is no apportionment of damage problems or duplicate recovery problems.

Similarly, Crimpers is not asserting damage claims for injuries that duplicate those that might be claimed by the local cable company operators. However, HBO and Showtime are asserting that it is the local cable company operators that have standing to sue and the claim of HBO and Showtime is that Crimpers is asserting claims that pose a risk of multiple liability for one antitrust violation.

Moreover, the case at bar is distinguishable from those cases which deal with the factor of duplicate recoveries which are the *Associated General* case and the cases of *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977).

In the *Associated General* case, this Court noted on page 912 the following with respect to duplicate recoveries:

> "In this case, if the Union's Complaint asserts a claim for damages under Section 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities."

However, in the case at bar, no such problem of identifying damages or apportioning damages exists as Crimpers was the direct victim of the antitrust violations of HBO and Showtime.

In the *Hanover Shoe* case and the *Illinois Brick* case, the Courts were dealing with the unique area of price fixing and the fear that treble damages could be recovered by indirect purchasers who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. In the case at bar, Crimpers suffered a direct injury due to the desires of HBO and Showtime to destroy a trade show which did not adopt the policies and procedures of trade shows HBO and Showtime supported in the past in the Cable Television Industry and which HBO and Showtime feared would allow sellers of programming to congregate in an effort to sell their programming independently of HBO and Showtime.

Certainly, this factor is also to be determined from the fact that the issue of "standing" is "fact-sensitive." In the *Associated General* case, the Court was dealing with the uniqueness of a union and the vague injuries alleged by the Union. In the *Hanover Shoe* and *Illinois Brick* cases, the Courts were dealing with plaintiffs which were far removed in the chain of persons alleged to be damaged by the antitrust violations of the defendants in said cases.

However, in the within case, we are dealing with an entity which was directly injured by the actions of HBO and Showtime. Crimpers was no mere supplier or customer which existed many steps away from those persons who were directly injured by the acts of HBO and Showtime. Rather, Crimpers, as in the *McCready* case, was the direct means by which HBO and Showtime achieved their goal of restraining trade in the buying and selling of cable programming on a stand-alone basis.

The lower court determined that Crimpers satisfied the factor of double recovery enunciated by this Court in *Associated General* in the following manner:

> "We can see no danger of double recovery in recognizing Crimpers' standing. Crimpers' injury from having its trade show destroyed — the expenses incurred in preparing the show, the loss of reasonably anticipated profits from the show, perhaps even the loss of profits reasonably expected for the future is distinct and different from the losses of producers in getting too little for their programs or of cable television stations in paying too much. To be sure the case is unlike *McCready* in that the defendants here may have to pay Crimpers as well as the producers and the stations if they were to file suit and ultimately prevail, whereas the *McCready* defendants needed only to pay the plaintiff and her class, the psychologists having suffered no damage since the plaintiffs had continued to use them. But this means simply that if defendants had injured only the producers and the stations, the damages would have been less than if, in the course of their allegedly unlawful conduct, they also injured a company like Crimpers which was endeavoring to facilitate direct dealings between the two. This is not the kind of 'double recovery' which *Hawaii*[3] and *Illinois Brick* sought to prevent." (App. A at 7a-8a).

Therefore, it is respectfully submitted that the factor of duplicate recoveries, although applicable in a union or price fixing conspiracy case, is not applicable to the case at bar where there is no such risk of duplicate recovery.

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3. The Court was referring to the case of *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972).

F. Crimpers is the most logical plaintiff to bring a private suit.

HBO and Showtime argue in their brief that Crimpers is not the most logical plaintiff to bring a private suit, but that the local cable company operator is more clearly the person who is allegedly threatened by the violations alleged in the complaint herein.

As hereinbefore set forth, Crimpers was the victim of the conspiracy of HBO and Showtime and the antitrust violations they committed against Crimpers as alleged in the complaint.

HBO and Showtime are merely attempting to mislead this Court in creating an analogy between Crimpers and the Union in the *Associated General* case, which analogy cannot survive a careful analysis of the injuries allegedly suffered by the Union and Crimpers.

As stated by the *Associated General* Court, "the Union suffered unspecified injuries" (page 910) whereas Crimpers suffered in that its trade show was completely destroyed by the actions of Showtime and HBO. Simply stated, there were specific companies who had contracted to attend CATEL who decided instead to boycott it directly as a result of the actions of HBO and Showtime. On the other hand, in the *Associated General* case, the Union was not able to allege that any specific collective bargaining agreement was terminated, that the aggregate share of the contracting market controlled by Union firms was diminished, that the number of employed Union members had declined, or that the Union's revenues, in the form of dues or initiation fees, were decreased. *Id.* at 911. However, in the case at bar, Crimpers states that its revenue was substantially diminished by the actions of HBO and Showtime and that its trade show and its other business ventures were essentially destroyed by the antitrust violations herein.

For these reasons, it is respectfully submitted that Crimpers is the most logical plaintiff to bring the suit herein.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE *BICHAN, OSTROFE* AND *GAF* CASES WHICH ARE NOT APPLICABLE TO THE CASE AT BAR.

HBO and Showtime argue in their brief in support of the petition herein that the Second Circuit's decision below directly conflicts with the cases of *Bichan v. Chemetron Corp.* (In re Industrial Gas Antitrust Litigation), 681 F. 2d 514 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1261 (1983), *GAF Corp. v. Circle Floor Co.*, 463 F. 2d 752 (2nd Cir. 1972), *cert. dismissed*, 412 U.S. 901 (1973) and *Ostrofe v. H.S. Crocker Co.*, 670 F. 2d 1378 (9th Cir. 1982), *vacated and remanded*, 103 S. Ct. 1244 (1983). The argument asserted by HBO and Showtime essentially is contradictory to the statements made by HBO and Showtime in their brief that an antitrust standing issue is to be governed solely by application of the factors enunciated by this Court in *Associated General*. No conflict has been created whatsoever by the ruling of the Second Circuit in the case at bar. Instead, the Second Circuit merely applied the factors set forth in *Associated General*. Judge Friendly recognized this fact when he indicated in his opinion that the proper method of analyzing a standing issue is not to look to the Second Circuit target area test but rather to analyze the issue of "standing" under Section 4 by using the *McCready* and *Associated General* opinions (App. A at 6a).

HBO and Showtime both recognize on page 15 of their brief in support of the within petition, that the *Bichan* decision involves a fact pattern virtually identical to that in *Ostrofe*, both of which are substantially different then the facts existing in the case at bar.

For these purposes, Crimpers shall analyze the *Bichan* case in order to exhibit that both *Bichan* and *Ostrofe* have no bearing on the issue of "standing" as it exists in the case at bar.

In the *Bichan* case, a former corporate president who was terminated by his former employer and blacklisted by the industry brought action against his former employer and other corporations in the industry seeking treble damages. The plaintiff in the *Bichan* case was a salaried executive who was terminated from his position

as president of one of the defendants and allegedly blacklisted by the industrial gas industry. The court held that said plaintiff was not within the target area of the alleged anti-competitive conduct and had not suffered an "antitrust injury."

The *Bichan* case must be looked at very carefully from the standpoint of an identification of the particular plaintiff in said case. Mr. Bichan was dismissed from his job and since the time of his dismissal was unable to secure similar work in the industry. By reason of said facts, Mr. Bichan commenced an antitrust action alleging that a conspiracy existed to fix prices, to compose conditions of sales on customers and to allocate customers. It is very clearly the case that Mr. Bichan was not the target of the conspiracy of the defendants in said case.

On the other hand, Crimpers was the direct target of the antitrust violations of HBO and Showtime in the case at bar. HBO and Showtime intended to destroy CATEL. Certainly, the conspiracy in the *Bichan* case was not aimed at *Bichan* in that it dealt with the fixing of prices, the imposition of conditions of sales on customers and the allocation of customers and *Bichan* was simply an employee for one of the entities involved in said conspiracy.

While Mr. Bichan did not suffer an antitrust injury, Crimpers clearly has suffered such an injury. While *Bichan* was not a target of the alleged conspiracy, it is clear that Crimpers was a target of the conspiracy of HBO and Showtime.

In fact, the court in the *Bichan* case at 681 F. 2d 518 stated that "the fact remains that the target area test requires that the injuries sustained flow from a lessening of competition in the marketplace" and that "the injuries Bichan has suffered did not derive from the lessening of competition in the industrial gas industries." Clearly, Crimpers' injuries resulted directly from a lessening of competition in the Cable Television Industry. HBO and Showtime stopped said competition by boycotting and causing a boycott of CATEL.

Therefore, it is evident that the *Bichan* case is definitely distinguishable from the case at bar, because said case involves

a situation where a former employee is suing to allegedly prevent an antitrust violation in the industry where he worked in the past. It is evident that said employee was not a "target" of the antitrust violations whereas Crimpers was a definite target of the antitrust violations of Showtime and HBO.

The court, in *Bichan*, clearly set forth their holding as dealing with an employee action rather than an action by a true target such as Crimpers when the court held at 681 F. 2d 519 that "we are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge." In fact, the court went on to hold that a "mere relationship with the antitrust competitive scheme is insufficient to bring the injured party within the scope of Section 4; only where the injury is directly related to the scheme's anti-competitive effect does Section 4 apply." In the within case, Crimpers' injury is directly related to the scheme's anti-competitive effect.

The court further went on in the *Bichan* case to distinguish it from the Crimpers case when it held on pages 519-20 at 681 F. 2d that "as a general rule, stockholders, employees and creditors of an injured company and suppliers of an injured customer have all been denied recovery because their injuries were too 'indirect,' 'secondary,' or 'remote.' " *See Jeffrey v. Southwestern Bell*, 518 F. 2d 1129, 1131 (5th Cir. 1975).

The same analysis made herein with respect to *Bichan* would be applicable to the *Ostrofe* case wherein the plaintiff was a discharged employee who alleged that he had been boycotted by his employer and by other employers in the industry and further alleged that his discharge and the subsequent boycott resulted from his refusal to participate in an industry price-fixing and bid-rigging conspiracy.

The same analysis would apply to the *GAF* case.

Judge Friendly did not consider the *Bichan*, *Ostrofe* and *GAF* cases simply because of the fact that after *McCready* and *Associated General* were decided, "standing" issues are to be determined by applying the factors set forth therein.

Judge Friendly was merely following the mandates of *McCready* and *Associated General* in deciding the within case and fully recognized that issues regarding antitrust standing are fact-sensitive issues. Prior to *McCready* and *Associated General*, the courts always recognized that antitrust cases "must be carefully analyzed in terms of the particular factual matrix presented." *See Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F. 2d 501, 506 (3rd Cir. 1976). The antitrust violations of HBO and Showtime effectively destroyed Crimpers' trade show and its business of selling programming. Under the circumstances, Crimpers is one whose protection is the fundamental purpose of the antitrust laws and the factual matrix presented in the case at bar mandates this Court to deny the petition of HBO and Showtime. Simply speaking, the arguments of HBO and Showtime and the alleged analogies to the *Bichan, Ostrofe* and *GAF* case simply generalize too broadly from cases that are highly fact-sensitive.

It is, therefore, evident that the courts will determine the facts of each individual case and will not adopt any particular theory whether it be espoused in the *Calderone, Billy Baxter, Bichan, Ostrofe, GAF* or *Associated General* cases. In fact, notwithstanding said cases, the courts have held that recovery in cases similar to the case at bar should not be denied on some vague notion that "a line must be drawn." *See Congress Building Corp. v. Loew's, Inc.*, 246 F. 2d 587, 595 (7th Cir. 1957).

It is, therefore, evident that the argument made by HBO and Showtime that the decision below conflicts with *Bichan* and *Ostrofe* is an empty argument which can be given no credence whatsoever particularly in light of the fact that it contradicts the other arguments contained in the brief of HBO and Showtime which allege that it is only the factors enunciated in *Associated General* which should be used to determine whether or not antitrust standing exists at all.

It is for these reasons that the further argument made by HBO and Showtime that the ruling below threatens to frustrate this Court's efforts to bring order to antitrust standing law is a weak argument.

CONCLUSION

A review of the decision below will reveal that Judge Friendly analyzed and applied each and every factor enunciated by this Court in *Associated General* in determining whether or not standing exists in the case at bar.

As hereinbefore set forth when said factors were analyzed in this brief, said analysis by Judge Friendly was appropriate and proper under the circumstances existing herein.

For the foregoing reasons, the petition for a writ of certiorari filed by HBO and Showtime should be denied in its entirety with costs.

Respectfully submitted,

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